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NOMINATION OF SHERMAN E. UNGER

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

THE CONFIRMATION OF SHERMAN E. UNGER TO BE A JUDGE FOR THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SEPTEMBER 30; OCTOBER 5 AND 6, 1983

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NOMINATION OF SHERMAN E. UNGER

FRIDAY, SEPTEMBER 30, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 8:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin Hatch (acting chairman of the committee) presiding.

Also present: Senators Specter and Metzenbaum.

Staff present: Duke Short, chief investigator; Joseph Kopka, investigator; Roy Meyers, press secretary; and Stephen P. Johnson, counsel, Subcommittee on Juvenile Justice.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. The committee will come to order.

It is slightly past 8:30 now. Senator Hatch has sent word that he has been detained as a result of the heavy traffic occasioned by the rain which is plaguing the area this morning. Senator Hatch has suggested that we proceed. Since everybody has come in at 8:30, we will do so. He will be here.

We begin this morning with Sherman Unger. Welcome, Mr. Unger. You were present yesterday during the testimony of representatives of the American Bar Association—Mr. Coleman and Ms. Born. The committee would now be prepared to hear your response in your own way.

Mr. UNGER. Thank you very much, Senator Specter. I would appreciate a moment to make a very short opening statement, which somehow I did not get to do yesterday.

Senator SPECTER. I think that would be appropriate, Mr. Unger. Take what latitude you want in terms of an opening statement, and in responding to the information and evidence presented yesterday. Then the committee will proceed to question you.

I believe you have been sworn already.

Mr. UNGER. Yes; I was sworn yesterday.

Senator SPECTER. So, you are under oath at this time.

Without objection, we have a document to be inserted into the record at this point.

[Prepared statements of Sherman E. Unger and Richard C. Van Dusen follow:]

STATEMENT OF
SHERMAN E. UNGER
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

September 29, 1983

I am honored to appear before you as President Reagan's first nominee to the United States Court of Appeals for the Federal Circuit.

I am most grateful to Senator Packwood and Senator Warner for their kind and generous introduction. This Committee has been given a list of prominent and respected men who will testify in support of my nomination. These are men who have fashioned honorable and successful private careers and who have, from time to time, interrupted those careers to serve our Nation. The support and good opinion of friends such as these -- acquired during more than 30 years in the practice of law -- are precious to me.

I have worked for and want the respect and good opinion of my peers in the legal profession. It is for that as much as for anything else I have worked these last 30 years and I am pleased to point out that at no time during those years has an ethical violation or complaint of any sort ever been filed against me with any bar association.

I had hoped that my testimony before your Committee could be devoted to my reasons for wishing to become a federal judge and my thoughts on the significance of the new Federal Circuit. It grieves me, therefore, that my attention and energy must instead be directed to responding to certain actions opposing my nomination that have been taken by a standing committee of the American Bar Association.

I have been surprised by the opposition of this standing committee, and I have on a number of occasions over the last year attempted to dispel, with only limited success, the concerns of members of that committee. As I understand these concerns, they relate, primarily, to allegations that have been made by certain unidentified lawyers, some of whom I have litigated against in the past.

I feel compelled, at the outset, to observe that the process followed by that Committee is not designed to facilitate allegation resolution. The Committee claims a "confidentiality" of its sources which leaves one attempting to respond to nameless, faceless accusers whose motivations cannot be probed (I consider motivations to be a most important consideration), and whose allegations are most often vague and unspecific. While I recognize the ABA feels fully justified with the procedures it employs to advise the Department of Justice, it is easy for one being investigated to feel a certain lack of procedural fairness and openness. And, it is difficult for one to be forthcoming when asked, out of the blue, about events concerning one's personal and professional life that allegedly occurred ten or fifteen years ago. Some were totally untrue, some had a smattering of fact, all required a review of ancient records. I am certain you can understand the difficulty of response when you consider the "aging", often more than a decade, of most of the recognizable allegations. As a matter of fact, I do not recognize an allegation that purportedly occurred within the past five years.

Mr. Robert J. Short, Chief Investigator of the Senate Judiciary Committee, has provided me with a letter to him dated May 3, 1983 from that Committee, a copy of which has been supplied to each of you. The letter sets forth allegations which led the committee to oppose my nomination. I consider that letter to be terribly unfair and incapable of being substantiated. It is replete with the worst sort of hearsay, gossip, and innuendo.

As unfair as I consider these unsupported allegations, I believe I should answer them. I hope my answers will convince the members of the Senate Judiciary Committee to join the President and others who support my nomination.

I will answer those remaining allegations in the order that they appear in the May 3rd letter.

The unsupported general allegation that I "often engaged in *ex parte* meetings and conversations with judges in ongoing litigation" is false. The one specific allegation cited is misleading and unfair. That allegation neglects, among other things, the very important fact that *I did not request the conference*, but was called into chambers after a counsel for a creditor of Unit, Inc. had provided the judge with *ex parte* information about a different hearing.

Beginning in 1975, I, along with J. Vincent Aug, Sr., represented a Texas corporation, Unit, Inc., in Chapter XI bankruptcy proceedings before the late Judge Leonard C. Gartner of the United States Bankruptcy Court for the Southern District of Ohio, Western Division. Simultaneously, a limited partnership called Freidco of Wilmington, Delaware, Ltd. (Freidco) was involved in Chapter XII bankruptcy proceedings before Judge Balick of the United States Bankruptcy Court for the District of Delaware. Unit, Inc. was the general partner in Freidco, held a 71% interest in Freidco, and received substantial income from a management contract with Freidco.

On June 30, 1977, Judge Balick in Delaware entered an order appointing a trustee for the estate of Freidco. On July 12, 1977, Jay Rosenberg, counsel for one of the creditors of Unit, Inc., had a copy of Judge Balick's order delivered to Judge Gartner in Cincinnati in an ex parte effort to convince Judge Gartner that Judge Balick had appointed a trustee in the Delaware proceeding because Unit, Inc. was engaged in self-dealing and failing to fulfill its fiduciary duty to the Freidco partnership. Mr. Rosenberg's ultimate purpose was presumably to get Judge Gartner to terminate Unit's status as a debtor-in-possession in the Ohio Chapter XI proceeding and appoint a trustee.

Judge Gartner, acting in his role as manager of the Unit, Inc. bankruptcy proceeding, asked me to his office for an administrative conference on Judge Balick's order. During the conference, Judge Gartner became concerned that the expenses that would result from appointment of a trustee for Freidco would have a significant adverse effect upon Unit, and requested that I submit an application to him to reconsider an order he had entered in January 1976 denying a motion to consolidate the Freidco proceedings with the Unit proceedings in Cincinnati. I submitted an application and a proposed order, and Judge Gartner subsequently entered an order (which differed substantially from my proposed order) requesting that the parties submit briefs regarding the appropriate location for the Freidco proceedings.

Shortly thereafter, Judge Walter Stapleton of the U.S. District Court for the District of Delaware held a hearing on August 25, 1977, at which Judge Gartner testified, to investigate Judge Gartner's attempted intervention into the Freidco proceedings. Judge Stapleton granted a preliminary injunction barring Judge Gartner from reconsidering his order permitting transfer of the proceedings to Delaware, and the Third Circuit affirmed.

In the course of the hearing before Judge Stapleton, Judge Gartner made clear his belief that his administrative functions in bankruptcy cases necessitated occasional ex parte conferences with counsel, such as the one he had had with me. (Tr. 43, 104). Judge Gartner's position was by no means extraordinary at that time since under the pre-1978 version of the Bankruptcy Code, which governed the Unit proceedings, it was not unusual for bankruptcy judges to have "extensive ex parte contacts with the trustee and with counsel." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977), at pp. 88. While the Third Circuit clearly disagreed with Judge Gartner's practice of having such contacts, the court ultimately acknowledged that the practice appeared to be accepted in the Southern District of Ohio and concluded that "the judge . . . is the one who created the problems, the bankruptcy judge." (Tr. 14).

Thus, the ex parte contact to which the letter refers was at the request of the judge and in conformance with then-existing practice in bankruptcy proceedings in the Southern District of Ohio. Last February, I provided the ABA committee with affidavits of Judge Gartner's long time secretary as well as from two bankruptcy practitioners familiar with Judge Gartner's practices to the effect that it was Judge Gartner's policy to hold ex parte conferences on administrative and procedural matters. Those affidavits have been made available to your Committee. As you can see, such contacts with Judge Gartner were also made by Mr. Rosenberg on behalf of a creditor of Unit, Inc. I, if anything, was duty-bound to my client to respond to Judge Gartner's inquiry.

In 1975, in addition to serving as counsel for Unit, Inc., I represented a limited partnership called Scioto Park, Ltd. in a separate bankruptcy proceeding in the Southern District of Ohio. Because I was principally a trial lawyer and not an expert in the intricacies of bankruptcy law, I asked J. Vincent Aug, the recognized dean of the Cincinnati bankruptcy bar, to serve as my co-counsel in this matter as well.

In the course of each of these proceedings, Mr. Aug prepared and filed routine applications for appointment of attorneys with accompanying affidavits. In each case, I signed an affidavit prepared by Mr. Aug which stated:

> I am not related nor do I have any relationship to the debtor, or any party in this case, nor do I have any interest adverse to the debtor's estate.

At the time that I signed these affidavits, I was a limited partner with a small interest in three partnerships in which Unit, Inc. was either a general or a limited partner. One of these limited partnerships was Scioto Park, in which I held a two percent share of profits. The others were Freidco of Wilmington, in which I held a nine percent share of profits, and Hillcrest Square, Ltd., in which I held a 2.25% share of profits. My interests in these partnerships were disclosed to the court at several points during its administration of these proceedings.

The allegation that I intentionally made a false statement has already been exhaustively investigated on several occasions. Mr. Rosenberg, my opposing counsel in the Unit bankruptcy proceedings, first raised the matter before Judge Gartner in the context of challenging a sale of property by Hillcrest Square, Ltd. Judge Gartner, after five days of hearings, concluded that no material misstatement or impropriety had occurred and declined to block the sale. Mr. Rosenberg again raised his allegations with the U.S. Attorney in Cincinnati in 1980 in an effort to block my nomination as General Counsel of the Department of Commerce. Not only did the Justice Department decline to take any action in the matter, but the Chief of Special Prosecutions who conducted the investigation has unequivocally stated in an affidavit, provided to the ABA in

November 1982, that Mr. Rosenberg's allegations of fraud were "meritless, without foundation, and were not and could not be substantiated." That affidavit was provided the ABA and is on file with your Committee. Mr. Rosenberg's twice-refuted allegations have now made their way to the Senate Judiciary Committee. Mr. Aug has written the Chairman concerning this allegation and in addition has supplied your Committee an affidavit earlier given to the ABA committee on the same point. Mr. Aug is present today, prepared to testify in support of my nomination, and to discuss the issue further should the Committee desire.

I am confident that your Committee, like those who have previously investigated these charges, will find them baseless and inconsequential.

As I have pointed out to members of the ABA standing committee, the records of the Scioto Park bankruptcy proceedings indicate that I received court-approved fees of over $997,000 in the Scioto matter, of which the first $12,146 was approved by the court subsequent to payment and the last $985,000 approved prior to payment. Thus, the essence of the ABA allegation is that approximately one-tenth of one percent of all the fees awarded, a de minimus percentage, was paid prior to court approval. The ABA committee is apparently concluding that there is something seriously amiss about this fact even though the de minimus amount was approved routinely shortly after it was received and without protest from opposing counsel.

From February 1971 to September 1972, I served as Vice President of American Financial Corporation (AFC) in Cincinnati. Six years later, plaintiffs in Donohoo v. American Financial Corporation, a class action alleging securities fraud and corporate mismanagement on the part of AFC, requested that I file an application to substitute myself for plaintiffs' existing counsel. As part of an effort to prevent my serving as counsel for plaintiffs, defendants introduced affidavits of Kreider and Berghaussen, who served respectively as an attorney and a security guard for AFC as of the time I left the corporation. These affidavits, referring to alleged separate events, were prepared some six years after those alleged events. These allegations are, of course, false and I have always denied them.

Many people who knew me in 1972, including a current federal judge, provided the ABA and the staff of this Committee with affidavits that I was in no respect suicidal over my departure from AFC. I have repeatedly denied these affidavits over the years and have provided the ABA and this Committee with copies of such written denials. I would also suggest that if these allegations had any factual basis, some record would have been made contemporaneously with the alleged events. As a matter of fact, the lawyer who filed the affidavits in the first instance, John Muething of the Cincinnati Bar, has written your Chairman in support of my nomination and has filed with you an affidavit which states the affidavits the ABA raised were filed solely in connection with a matter of highly contested, complex litigation. Mr. Muething's affidavit then goes on to say that notwithstanding having caused the previous filing, "it is my opinion that Mr. Unger possesses the legal ability, the integrity, the personal temperament and judicial qualifications which qualify him for service to the Federal Bench."

The letter suggests I was asked to resign from HUD. It is interesting to note that the allegation neglects to state who allegedly asked me to resign. I became General Counsel of the Department of Housing and Urban Development (HUD) in January 1969. In July 1970, President Nixon nominated me to become a member of the Federal Communications Commission (FCC). Immediately thereafter, the Internal Revenue Service audited my 1968 federal income tax return, and claimed that I had failed to report certain income, primarily, "constructive income" supposedly resulting from certain complex stock transactions.

Although this matter was ultimately settled at the appellate level, the audit engendered substantial publicity and delayed my FCC confirmation hearing. Meanwhile, President Nixon, "with special reluctance," relieved me of my responsibilities as General Counsel of HUD in October 1970 so that my successor could be confirmed. This action was taken at the request of Senator Hugh Scott, who sought to have a fellow Pennsylvanian take office. Senator Scott, who served on the Judiciary Committee, wrote the ABA on November 17, 1982, recommending that the ABA support my nomination and is prepared to testify in support of my confirmation today.

Ultimately, I became concerned that the impossibility of resolving the tax matter expeditiously and the resultant delay in scheduling confirmation hearings might cause embarrassment to the Administration. Accordingly, I asked President Nixon in December 1970 to withdraw my nomination as a member of the Federal Communications Commission. On December 10, 1970, President Nixon withdrew my nomination "with particular regret," adding that he was looking "forward to another opportunity to count [me] as a member of the Administration's team." The President subsequently appointed me to a three-year term as a member of the National Advisory Committee on Economic Opportunity. President Nixon has since corresponded with me and recently sent a letter congratulating me on being nominated for the new Federal Circuit and praising my qualifications for the job. Copies of all these letters are on file with your Committee.

The letter suggests that I misrepresented to a federal court in Delaware the availability of a witness to testify in the bankruptcy proceeding involving Freidco of Wilmington, Delaware, Ltd.

This allegation is false. During hearings in Wilmington in the spring 1976 on the appointment of a trustee in the Freidco bankruptcy proceedings, there was some discussion about the availability of Mr. Morris, a representative of the debtor, to testify. However, the transcript of those hearings, copies of which I have provided the Committee, reveals that I at no time stated that Mr. Morris was unavailable. Rather, I truthfully represented to the court that counsel for applicants had failed to follow the procedures necessary to obtain Mr. Morris' appearance if they wished it.[1]

On April 27, 1976, the second day of the relevant hearings, counsel for certain of Freidco's creditors requested me to advise whether Mr. Morris would be available during the proceedings. I responded as follows:

> No one has made a request for Mr. Morris, Your Honor. There are appropriate procedures to be followed if they wish to cross-examine him. (Tr. 187.)

After my co-counsel noted that applicants had not tendered the mileage fees that would be required to obtain Mr. Morris' appearance, the court stated that he was sure that counsel for the applicants "[knew] the procedure to get Mr. Morris into the court." (Tr. 188.) In response to a further question as to whether Freidco intended to have Mr. Morris present, I stated that I "[felt] confident that Mr. Morris [would] be in court some time during the proceeding," but explicitly added that "my confidence isn't an absolute guarantee that he will be here." Id. Later in the proceedings, on May 18, 1976, counsel for applicants again stated that "we would have been perfectly happy to have Mr. Morris here and to cross-examine him." (Tr. 989.) I responded that "[a]ll Mr. Welsh had to do was ask. He failed to do so, your Honor." There was no misrepresentation.

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[1] In fact, Mr. Morris had come to Wilmington twice for lengthy depositions, on April 14 and April 22, and had also come to Wilmington to testify at a meeting of creditors held on May 6, during a hiatus in this evidentiary hearing.

The letter raises the propriety of my attempting to have myself substituted as trial counsel for plaintiff in the case of Donohoo v. American Financial Corporation in the federal District Court for the Southern District of Ohio.

I did not act improperly in filing, at plaintiffs' request, an application for substitution of counsel for plaintiffs in Donohoo v. AFC. Plaintiffs were long time clients of mine and were dissatisfied with the performance of their existing counsel and by letter dated April 11, 1978, informed their existing counsel that they had requested that I enter an appearance as counsel in the case.

The court denied an application for substitution of counsel in a 25-page memorandum opinion dated July 31, 1978. A reading of the memorandum makes clear that the court found the application worthy of serious analysis. Nonetheless, the court concluded that applicants had failed to make the strong showing of good cause necessary to displace trial counsel in a derivative suit at such an advanced stage in the proceedings.

As for the allegation that my prior association with AFC gave my efforts at substitution the "appearance of impropriety," the court expressly stated that it did not intend to be critical of me. Memorandum Opinion at 8. Moreover, the court affirmatively disavowed any determination that I had violated Canon 9. Id. at 24.

The letter makes the general allegation that I improperly interferred with opposing counsel's attempt to conduct depositions and engage in other legitimate discovery in certain litigation, and that many opposing counsel and some judges Mr. Unger appeared before stated that he was often intemperate and abusive in court.

These two allegations are simply too vague to permit me to respond. Certainly, in the course of my conducting a successful private practice as a litigator, I have been involved in numerous, sometimes heated debates with my opponents over the appropriate scope of discovery. However, it is completely unfair to characterize the aggressive representation of my clients' interests as improper, or imply that my opponents were always acting properly. For example, in Pittsburgh National Bank v. Scioto Park, Ltd., the court stated (in a May 25, 1979 order granting sanctions) that the conduct of my opposing counsel, Mr. Rosenberg, again, and his co-counsel, during discovery was "contemptible", "detestable", "unprofessional", and "incredible", an "obstruction of justice" which the court "cannot condone and must censor." In Grace v. Hargadine, a Federal District Judge filed a 39-page Memorandum and Certificate concerning the conduct of my opposing counsel, Robert L. Keeler of the Cincinnati Bar, which stated that Mr. Keeler had "so obstructed the proper administration of justice herein as to block me in the performance of my judicial duties." The court, in its Certificate, concluded there were a "multitude of apparently contemptuous acts which Mr. Keeler committed in connection with this trial . . ." Mr. Rosenberg and Mr. Keeler have lobbied actively against my appointment. Copies of both documents are on file with your Committee.

Nearly all of the foregoing allegations stem from very intense litigation, most surrounded a series of related bankruptcies. In the last of these allegations, the ABA seems to suggest that I provide you the names of persons who can testify as to my conduct. I can think of no one better than my witness this afternoon.

# # #

I am indeed sorry that the Senate Judiciary Committee's time must be consumed looking into these charges. I appreciate your thoughtful consideration of my nomination, and hope that I have laid to rest any concerns that may have been raised. I am, of course, pleased to respond further to any questions you may have.

RICHARD C. VAN DUSEN

September 26, 1983

Mr. Robert Short
Chief Investigator
United States Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Short:

In accordance with our telephone conversation of last week, I enclose a written statement which I hope may be of assistance to the Committee on the Judiciary as it considers the nomination of Sherman Unger to be a judge of the United States Court of Appeals for the Federal Circuit.

I regret that the hearing date as finally selected presents schedule conflicts which prevent my appearing in person. If you or members of the Committee require further information, please don't hesitate to call.

Your associate, Mr. Kopka, asked that I contact George Romney to inquire whether he might submit a similar statement. Mr. Romney has been out of the city since late last week and I have thus far been unable to reach him. I will continue to try and hope that I may be successful in time to be useful to you.

Sincerely,

Richard C. Van Dusen

RCV/cd
Enclosure

cc: Lewis H. Van Dusen, Jr., Esquire
William T. Coleman, Jr., Esquire

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

In the Matter of the Nomination of
Sherman Unger to be Judge,
United States Court of Appeals for the Federal Circuit.

Statement of Richard C. Van Dusen

My name is Richard C. Van Dusen. I am an attorney. Since 1949, I have been a member of the State Bar of Michigan, and I have been admitted to practice in the United States District Court for the Eastern District of Michigan, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court. I am a partner in the Detroit, Michigan law firm of Dickinson, Wright, Moon, Van Dusen & Freeman, with which I have been associated, except for two interruptions for state and federal government service, since 1949.

From 1969 through 1972, I served as the Under Secretary of the United States Department of Housing and Urban Development. From early 1969 until about October of 1970, Sherman Unger was the General Counsel of the Department of Housing and Urban Development. He was appointed by and served at the pleasure of the President. Within the Department, he reported to the Secretary, George Romney, and to me.

I understand that Mr. Unger's appointment as a Judge of the United States Court of Appeals for the Federal Circuit is before the United States Senate Committee on the Judiciary. Some months ago, when Mr. Unger's appointment was first submitted to the Senate, I was contacted by the cognizant committee of the American Bar Association and asked if I had information relevant to Mr. Unger's qualifications for this judicial post. I provided certain information which I regarded as relevant, and responded affirmatively when asked whether I would be willing to testify before the Senate when it considered the nomination. Because of scheduling problems and conflicts, it now appears that I will be unable to appear in person. At the suggestion of the staff of the Senate Committee on the Judiciary, I respectfully submit this written statement.

What follows is based on my recollection, refreshed as best I can, of events which took place over twelve years ago. I cannot, therefore, guaranty precise accuracy. Subject to those qualifications, I believe the discussion which follows to be essentially correct.

As I have indicated above, Mr. Unger and I both served in the Department of Housing and Urban Development from early 1969 until his departure in the Fall of 1970. I found him to be intelligent and energetic. I also found him to be very ambitious. By early 1970, I became concerned about the impact of his ambition on his judgment and conduct as a senior official of the Department. I cannot, at this point, recall specific examples other than the one described below. But, as a general proposition, it appeared to me that Mr. Unger had "his own agenda," which was not necessarily consistent with the policies and objectives of the Department as established by the Secretary.

The example of Mr. Unger's conduct which I do recall, and which ultimately led Secretary Romney and myself to request that Mr. Unger resign as General Counsel of HUD, related to the transition of the Federal National Mortgage Association ("FNMA") from government entity status to private corporate status, pursuant to the Housing and Urban Development Act of 1968. The statute gave the Secretary of HUD considerable authority, during the transition period, to select the Board of Directors of FNMA, but eventually a majority of the Board was to be elected by the shareholders, with a minority to be designated by the President of the United States. As the transition period drew to a close in early 1970, a group of private citizens had been selected as directors to be elected by the shareholders. Mr. Unger was to be a Presidential appointee on the board.

Mr. Unger advised the then President of FNMA, Oakley Hunter, that Mr. Unger wished to be designated Chairman of the Board of FNMA. Mr. Hunter, however, concluded that in the interest of establishing FNMA's stature in the financial community as a private corporation, it would be desirable that the Chairman of the Board of FNMA be a distinguished private citizen, and Mr. Hunter obtained the commitment of former

General Lucius Clay, a FNMA director to be elected by its shareholders, to serve in that capacity. Secretary Romney concurred in the selection of General Clay as Chairman.

After he learned of General Clay's selection for the position to which he had himself aspired, Mr. Unger gave his legal opinion that General Clay had a conflict of interest which would preclude his service. This was a source of considerable embarrassment. As I recall it, it was necessary to request and obtain from the Office of Legal Counsel in the Department of Justice, an opinion that there was no disqualifying conflict.

Mr. Unger's actions, in which, in my opinion, his own self interest led him to act in a manner contrary to the expressed positions of the Secretary, caused the Secretary and myself to conclude that he could no longer serve effectively as General Counsel of HUD. With the concurrence of the White House, we requested his resignation.

Mr. Unger at first agreed to resign, but asked that he be permitted to remain in office until his successor was nominated. The selection of a new General Counsel took, as I recall it, two or three months, during much of which period Mr. Unger absented himself from the Department. When his successor was chosen by President Nixon, in September or October of 1970, and the nomination of the new General Counsel was sent to the Senate, Mr. Unger was reminded of his agreement to resign and was asked to submit his formal resignation. He declined to do so.

Because the Senate was unwilling to approve the appointment of a new General Counsel while a question existed regarding the existence of a vacancy, it then became necessary to obtain a letter from President Nixon terminating Mr. Unger's service as General Counsel. The assistance of the White House was requested by the Department, and through the intervention of Peter Flanigan, Assistant to the President, the President wrote to Mr. Unger a letter relieving him of his responsibilities as General Counsel of HUD. I believe this action was taken in October of 1970.

I have had no contact of any consequence with Mr. Unger since he left the Department of Housing and Urban Development. I recall one chance meeting in Washington several years ago as being the only contact at all. It is possible that with the passage of time he has developed in maturity and judgment.

However, on the basis of my experience with Mr. Unger in 1969 and 1970, in my opinion he did not then possess qualities of judgment and temperament appropriate and necessary in a Federal Judge. I hope this statement may be of assistance to the Committee in the execution of its important responsibility.

TESTIMONY OF SHERMAN E. UNGER, NOMINEE

Mr. Unger. I will shorten my opening statement even shorter, since we are so far into it.

I did want to express the fact that I do feel honored to appear before this committee as President Reagan's first nominee to the new U.S. Circuit Court for the Federal Circuit.

I want to express my gratitude to Senators Packwood and Warner for their kind introductions and to the men that have volunteered to testify in support of me. These are men of stature and good friends that I have known and worked with over the last 30 years and whose respect I cherish.

I wanted also to add that I have some agreement with the members of the patent bar that testified yesterday that there should be an appropriate mix of patent lawyers and other lawyers on this new circuit since it does have primary responsibility for patent cases. For them it is essentially a court of last resort except for those few cases that go to the Supreme Court. I recognize that a certain number of these judges should in fact have some background in patent work. I also recognize that it covers Government contracts, trade laws, and a number of other things in which I have a depth of experience.

I really do not see any point in taking any more time this morning on an opening statement and generalities. I am prepared to respond to any questions you may have.

Senator SPECTER. Mr. Unger, let us begin with the ex parte issue. What is your response to that? Let us wait just a minute. Senator Hatch has just come in. Since he is here, it would be the most orderly process to await your response to this question.

Mr. UNGER. Thank you.

Senator HATCH. Mr. Unger, I apologize for being late this morning. I have been with Evans and Novak. I committed to them that I would be on their show this morning at 9 o'clock. They did not start taping until late, so I really rushed here from Georgetown.

Also, some of our members would prefer that we delay this but we only have until 10 o'clock to conclude this. I think you deserve, after reading the Washington Post this morning, to be able to answer some of the questions that were raised. I hope we can complete our hearing on your qualifications to be U.S. Circuit Court Judge for the Federal Circuit.

This committee met for nearly 6 hours yesterday, hearing from both supporters and opponents of this nomination.

As I understand it, Mr. Unger, you are presently serving as general counsel for the Department of Commerce.

Have you been sworn in?

Mr. UNGER. Yes, sir.

Senator HATCH. I believe that the best way for me to proceed with the questioning is to address each of the criticisms of the ABA special committee in turn. So, I will try to address these each in turn the way Mr. Coleman raised them before the committee yesterday.

Mr. Coleman and his committee have alleged that you were fired as General Counsel to the Department of Housing and Urban Development in 1970 under circumstances that would mitigate against your present employment. How would you respond to this?

INTRODUCTION OF MICHAEL KOHN, SENIOR ASSOCIATE

Mr. UNGER. I will respond to it, Senator. I would first like to introduce Michael Kohn, who is at the table with me. Michael was my senior associate during most of the bankruptcy matters of the last 4 or 5 years that are concerned by these charges. I have asked him to assist me with certain papers as we go forward.

I have not personally seen the Van Dusen or Romney letters; I have only heard about them. I will, however, respond to my departure from HUD. I would like to do it as expeditiously as possible.

When I was General Counsel of HUD—I was sworn in in January 1969—there was an understanding that Judge Roettger brought out yesterday that Mr. Van Dusen would serve 1 year and then would go back to Detroit, and I would become the new Under Secretary. It also developed that I was the Nixon man, if you will, inside HUD; and there were some policy differences between HUD as it was being run under the Secretary and Under Secretary and the way the White House wanted certain things run. I found myself in a difficult position. I found that there were major policy disagreements within the Department.

I was ready to leave at the end of the year when Mr. Van Dusen did not leave, and I was delighted to be nominated to the FCC, which occurred in July 1970. Shortly after that nomination, almost immediately after that nomination, my 1968 tax return was audited. It was during that audit that I went out to—to put it into perspective, I had just moved into Washington 2 or 3 months earlier, when I did my tax return by myself late at night. When the 1968 audit came up, it was in July or August 1970, there were a couple of claims that they made that I immediately paid, thinking I could dispose of this so that I would not have a problem on my FCC confirmation. They raised a question that dealt with constructive income and in a substantial amount of money. I was not able to dispose of that quickly. I worked on it a long time.

The effect of that was that I was out of HUD. Judge Roettger, then Deputy General Counsel, became Acting General Counsel.

During this period of time in which I was trying to clear up my 1968 return, Senator Scott, as he testified yesterday, had a constituent of his that he wanted to be placed into that job. It was at Senator Scott's urging that I was relieved of my responsibilities so David Maxwell could be sworn in.

Now, Mr. Van Dusen and I did not have, we did not enjoy a warm relationship because we had differences of policy agreements at HUD. Mr. Van Dusen, however, has a convenient memory.

I provided yesterday, I was able to get from the Department of Justice at the last minute yesterday out of one of their computers the fact that I did not write the conflict of opinion letter he accuses me of having written. That conflict of interest letter was written by the Civil Service Commission, and it is reflected in the document that was introduced yesterday. The opinion is signed by now Mr. Justice Rehnquist.

When Fannie Mae was going through its change from public to private, there was an issue raised. It was first brought to me, since HUD had oversight on whether or not there could be a conflict of interest for serving on the board and also doing business with Fannie Mae. I was on the board of Fannie Mae. I said I would not touch that with a 10-foot pole; that is not my responsibility. I turned it over to the Civil Service Commission. The Civil Service Commission came back with an opinion that it was a conflict. I was surprised that that was the ultimate conclusion, but it was their conclusion. I would refer the committee to Mr. Rehnquist's opinion, which points out that it was me, Sherman Unger, the General Counsel of the Department of Housing, that turned over the Civil Service Commission to the Department of Justice for review, because I had some concern about the conclusion.

I was not using that for my own self-service, as Mr. Van Dusen apparently suggests in his letter.

I do not know if it is appropriate for me to see that letter or not, but——

Senator SPECTER. Mr. Chairman, we have had a number of references to the letter. Is there such a letter?

Senator HATCH. Yes; we brought it out yesterday.

Senator SPECTER. I just inquired about it with staff and was told——

Senator HATCH. Excuse me. This is the Van Dusen letter?

Mr. SHORT. Yes, sir, we have the Van Dusen letter.

Senator SPECTER. There have been a number of references to it. I think we ought to see it.

Senator HATCH. I have not seen it.

Mr. **Unger**. I think that Senator Metzenbaum was reading from it yesterday.

Mr. **Coleman**. Mr. Van Dusen filed testimony. The only reason he was prepared to come in on Wednesday, and when the committee shifted the hearing to Thursday he had a professional commitment in Michigan. He is prepared to come in at any other time. He has detailed testimony where he spells out the whole thing.

Senator **Hatch**. I understand——

Senator **Specter**. Mr. Coleman, is there a letter?

Mr. **Coleman**. It is not a letter; it is his testimony.

Senator **Specter**. I see. So, there is no letter as such.

Mr. **Coleman**. There is his covering letter saying this is my testimony, but I am not aware——

Senator **Hatch**. Let me clarify. I have not seen the letter but there is a statement of Richard C. Van Dusen concerning the nomination of Sherman Unger to be judge, U.S. Court of Appeals for the Federal Circuit. I do not see a date on it. We will enter that into the record immediately preceding your testimony here today so that the record will be complete.

Please continue.

Mr. **Unger**. As far as the conflict of interest opinion that I was questioned about yesterday that was brought up yesterday, I did not write it. I did send it to the Department of Justice. It was reversed by the Department of Justice. It was not something of my making. And Mr. Van Dusen is in error when he suggests that it was.

Mr. Van Dusen may have asked for my resignation, but Mr. Van Dusen did not appoint me.

If that is the reference to asking for my resignation, the President of the United States appointed me. The President of the United States had a nomination then pending for the Federal Communications Commission and which he left pending, which would lead me to believe that he bad continued confidence in me. The President of the United States subsequently—the same President of the United States subsequently appointed me to a 3-year Presidential Commission on Economic Opportunity.

There were policy differences between myself, the Under Secretary and Secretary at HUD. I think Mr. Van Dusen's letter said I did not agree with the departmental policies. I think I did agree with the Presidential policies.

Senator **Hatch**. Do I understand you correctly, that you and Mr. Van Dusen did not have a warm relationship?

Mr. **Unger**. Yes, sir.

Senator **Hatch**. So, he does not feel good toward you.

Mr. **Unger**. I think that is a fair statement.

Senator **Hatch**. I do not know how you feel toward him, but it is more important how he feels toward you in this context.

No. 2, you are saying you did not write the memorandum that he has accused you of writing.

Mr. **Unger**. That is correct.

Senator **Hatch**. No. 3, you are saying that you have a letter by Justice Rehnquist, that we put into the record yesterday that makes it clear that you did not write the memorandum.

Mr. **Unger**. Yes, sir.

Senator HATCH. So, you are saying that is a false allegation also against you.

Mr. UNGER. Yes, sir.

Senator HATCH. No. 4, you are saying that you were not fired from HUD, and that Van Dusen did not have the power to fire you because you were nominated and appointed by the President.

Mr. UNGER. That is correct.

Senator HATCH. Further, in rebuttal, in spite of the allegation of being fired, you were nominated for another position in the Government, the FCC.

Mr. UNGER. I was nominated for the FCC, and subsequently again nominated to serve on a Presidential Commission.

Senator HATCH. And you wound up serving on the Presidential Commission. And all three appointments were Presidential appointments?

Mr. UNGER. Yes, sir.

I call your attention to Senator Scott's testimony yesterday that he pushed to have his man confirmed in October 1970, I believe it was; and that he personally had knowledge of my departure.

Senator HATCH. What finally did happen to your position at HUD? Did you voluntarily resign, or were you pushed out?

Mr. UNGER. I got a letter from President Nixon saying with special reluctance he was relieving me so that my successor could be confirmed. Senator Scott said that was at his personal urging.

Senator HATCH. In spite of that, he nominated you for the FCC?

Mr. UNGER. My FCC nomination continued to be pending while I worked on my tax case.

Senator HATCH. With regard to the FCC, did you voluntarily withdraw there, or did they ask you to withdraw?

Mr. UNGER. No. I voluntarily withdrew. I have copies of my letter to the President withdrawing and copies of the President's return letter containing what I consider to be a complimentary response on that issue. I withdrew because I was not able to resolve the constructive income issue. I did resolve the constructive income issue in December of 1971 for $3,000.

Senator HATCH. So, you voluntarily withdrew because you felt that the tax problem had to be resolved before you could be nominated or appointed to anything else?

Mr. UNGER. Yes, sir. At that stage in my life, that was a lot of money; and I could not afford to lose that.

Senator HATCH. So, you had to fight that.

Mr. UNGER. Yes, sir.

Senator HATCH. In the end, did you resolve the IRS difficulty?

Mr. UNGER. In the end, I resolved it for payment of about $3,000, plus, I think, a negligence penalty of a hundred and something.

Senator HATCH. So, you were able to resolve a claim for well over $100,000 for $3,000 plus a small negligence payment?

Mr. UNGER. Yes, sir.

And I would like to enter into the record at the appropriate time my letter withdrawing the FCC nomination and President Nixon's response.

Senator HATCH. Without objection, we will enter both of those documents into the record.

[Material referred to follows:]

SHERMAN UNGER

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

It is with sincere regret that I request my nomination to the Federal Communications Commission be withdrawn. There is so little time left in the term for which I was nominated that further delay would, in my judgment, not serve in the best interests of your Administration, the Commission and the communications industry.

I deeply appreciate the trust and confidence you expressed by placing my name in nomination. I also wish to thank you for the opportunity to have served as General Counsel of the Department of Housing and Urban Development and to continue to serve as your appointee on the Board of Directors of the Federal National Mortgage Association. I look forward to the opportunity to be of additional service to you in the future.

I am confident that this Administration will continue to provide our nation with the firm creative and resourceful leadership that it has already demonstrated and that our country is well served by your Presidency.

Respectfully,

Sherman Unger

THE WHITE HOUSE
WASHINGTON

December 10, 1970

Dear Sherm:

As you have requested, I will withdraw your nomination as a member of the Federal Communications Commission. I will do so with particular regret: it was a pleasure last July to send your name to the Senate. I was confident then as I am now that your many abilities would be of singular value to the Commission's work, but I am sure that the decision you have made reflects long and careful thought.

As you know, the encouragement and the friendship you have given me over the years means a great deal, and I will always be grateful for your participation and your help in the campaigns we have fought together.

Your service to this Administration as General Counsel to the Department of Housing and Urban Development was a credit both to you and to the Department. In view of your steadfast dedication to the well-being of all of our fellow citizens, I am sure that you will continue to serve this country in any activity you undertake in the years ahead, and I am going to look forward to another opportunity to count you as a member of our Administration's team.

With warm personal regards,

Sincerely,

Richard Nixon

Mr. Sherman Unger
The Watergate Hotel
2650 Virginia Avenue NW
Washington, D. C. 20037

Senator HATCH. So, you voluntarily withdraw because you had to resolve this rather large claim that the Federal Government had against you?

Mr. UNGER. Yes, sir.

Senator HATCH. Is it also true that the Federal Government was criminally investigating this matter? Do you know?

Mr. UNGER. I gather—I found that out, that there was what they call an intelligence agent that came in for about 30 days and looked at it and left. I think that is true.

Senator HATCH. How was that resolved?

Mr. UNGER. In my favor. There was no——

Senator HATCH. In other words, the criticism that you were fired from HUD and that you really had to withdraw your nomination because of income tax matters may not tell the whole story. You claim you were not fired from HUD. You were asked to resign so that they could replace you.

Mr. UNGER. I was already nominated for the FCC.

Senator HATCH. Right; and then you personally withdrew from the FCC. And it is true that you withdrew because of your income tax difficulties but mainly because you wanted to resolve it.

Mr. UNGER. Yes, sir.

Senator HATCH. You felt that was more important than being on the FCC at the time, since you had gone through this experience, including an investigation by an intelligence agent.

Mr. UNGER. The intelligence agent was long gone from the case. What was not gone from the case was my ability to pay all of that money if I did not prevail, and I had to make a case. They had a new theory, and it was wrong.

Senator HATCH. And this was resolved for $3,000 plus a negligence fee, but no criminal charges were filed.

Mr. UNGER. No, sir.

Senator HATCH. Was there a resolution of any criminal investigation?

Mr. UNGER. Yes, sir.

Senator HATCH. Did it resolve in your favor?

Mr. UNGER. Yes, sir.

Senator HATCH. Then the President nominated you again for this other commission.

Mr. UNGER. That is correct.

Senator HATCH. And were you confirmed?

Mr. UNGER. I served on that commission for 3 years.

Senator HATCH. OK. Senator Specter, do you have any questions on this? I think maybe we will go back and forth on each one of these.

Senator SPECTER. Fine. Yes, I do, Mr. Chairman, thank you.

What was the substantive contention of the Government on the tax issue, Mr. Unger?

Mr. UNGER. May I break it down into two parts?

Senator SPECTER. Of course.

Mr. UNGER. In the initial audit, there were a lot of odds and ends, some of which, had I not had a nomination pending, I would have pursued at the audit level or taken to the appellate level because, in my judgment, the auditor was at least very strict.

Senator SPECTER. Was there an issue concerning $40,000?

Mr. UNGER. Initially in the audit there was an issue of a $1,000 bonus and an issue that I had received payment of $40,000, which I immediately changed for stock. As soon as that was brought up, I went to Arthur Andersen and filed an amended return.

To put this into perspective, if I may, sir, I had just come to Washington. I went through my checkbooks. I still had not moved to Washington. I went through my checkbooks and on April 15 filed a return that was, to the best of my knowledge and belief, accurate. Those particular checks, I do not think, went through my checkbook. I did not——

Senator SPECTER. Are you talking about—checks on income would not go through your checkbook. They would be deposits?

Mr. UNGER. What happened, as I remember it, is that in a corporate transaction I was paid a fee, immediately signed the checks over to the corporation for stock. It may have been better to have run it through my checkbook. But I had no memory of it when I filed my return.

Senator SPECTER. You received a check for $40,000 for a legal fee?

Mr. UNGER. Yes, sir.

Senator SPECTER. And you immediately used that check to buy stock in the company?

Mr. UNGER. Yes, sir.

Senator SPECTER. And then that issue was raised because you had not included the $40,000 as income——

Mr. UNGER. In the initial audit. That is correct. And immediately I paid it.

Senator SPECTER. And when it was called to your attention, you filed an amended return and paid tax on it.

Mr. UNGER. Yes, sir, immediately.

There was no question that that was a taxable event. I simply forgot it.

Senator SPECTER. You forgot the $40,000.

Mr. UNGER. I did not find it in my checkbook when I was preparing my return.

I might say that, if one looks at my income tax returns for the last 10 or 15 years, I have been in an exceptionally high tax bracket and have paid an awful lot of tax.

Senator SPECTER. Which year was it?

Mr. UNGER. That was 1968.

Senator SPECTER. How much was your tax? I do not mean to intrude, but I would like to have some idea of the relationship of the $40,000 to your total income.

Mr. UNGER. I am not sure. I would need to——

Senator SPECTER. As I say, I do not mean to inquire unnecessarily.

Mr. UNGER. I will submit—I cannot tell you from memory.

Senator SPECTER. All right. I think it would be useful and perhaps it might be most appropriate if you submit——

Mr. UNGER. I would say——

Senator SPECTER. Excuse me, Mr. Unger. I want to finish.

Mr. UNGER [continuing]. Close to——

Senator SPECTER. Excuse me, I want to finish.

Mr. UNGER. I am sorry.

Senator SPECTER. I think it might be appropriate if we took a look at your 1968 tax return without revealing it in a public hearing. If you would submit that, I would appreciate it.

With respect to the FCC, did you serve on that commission?

Mr. UNGER. No. sir, I did not. I withdrew—I asked that my nomination be withdrawn.

Senator SPECTER. Why did you do that?

Mr. UNGER. Because I had a $132,000 constructive income tax claim still pending that I could not resolve. And I thought that the IRS was totally in error.

Senator SPECTER. You had a $132,000 constructive income issue pending?

In what year was that?

Mr. UNGER. It was still the 1968 return.

Senator SPECTER. This is in addition to the $40,000——

Mr. UNGER. Yes.

Senator SPECTER. What are the underlying facts giving rise to the 132,000 issue?

Mr. UNGER. As I understand the theory of the auditor on that, it was an upstream merger. In other words, an operating company was merged up into a holding company. I owned stock in both companies. When there was an upstream merger—because I think the company was getting ready to go public—certain other shareholders that had loaned money to the operating company converted their loan into a capital contribution, which was required by the company that was going to make the public offering. I had not made the same kind of loan.

The auditor's theory was that that was immediately—their capital contribution, which raised their bases, was income to me. There was no basis in law for that theory. And so we took it to the appellate level and essentially won.

Senator SPECTER. So, their contention on this $132,000 was rejected by the appellate level of IRS?

Mr. UNGER. We, no, they did not totally reject it. I had to pay $3,000. Now, I have tried some tax cases in my life, and that is what is called a nominal settlement; and generally they do not accept nominal settlements.

Senator SPECTER. I have tried some, too.

What was the basis for the settlement?

Mr. UNGER. I really believe it was face saving.

Senator SPECTER. So, what you are saying is that they did not abandon their claim; they simply discounted it because of the litigation risk, but they did not advance any alternative kind of a contention which would allow the conclusion that you owed only $3,000 in taxes?

Mr. UNGER. I think that is a fair statement. I think they had some rationalization for the $3,000, but essentially they discounted 97 percent of their claim.

Senator SPECTER. Do you have any documents which reflect this?

Mr. UNGER. I think I have—I know I submitted to the ABA, and I can find part of our protests from 1968. Part of the problem I am having, Senator, with some of these charges is there is a bit of aging to them, in finding my records and going back through dead files; it is not as easy as one might think.

Senator SPECTER. I can understand that.

Mr. UNGER. I can find the protest——

Senator SPECTER. I do not want to pursue the matter now, but if you could provide some additional information which would show, as fully as you can, the rationale for this conclusion, it would be helpful.

Mr. UNGER. I can provide you both with the protest and the final settlement. I do have the piece of paper in which I paid the $3,000.

Senator SPECTER. You say you found some documentation through a computer which indicates that you did not write the letter with respect to the alleged conflict on the part of Lucius Clay?

Mr. UNGER. That is correct, sir.

Senator SPECTER. What are the specifics on that?

Mr. UNGER. When I heard about it, which was the night before yesterday, the night before the hearings started, my memory—it was a shock, the accusation. My memory was that I did not write anything like that. I remember that there was a conflict.

I asked the Justice Department to look through their Office of Legal Counsel and see if they had not rendered an opinion based upon what I thought was an opinion that came from the Civil Service Commission and in fact did come from the Civil Service Commission. And I find that the Justice Department printout also shows that I sent it to them for review after I saw it.

Senator SPECTER. May I see that?

Mr. UNGER. Yes, sir.

Senator SPECTER. So, you contend is that the letter on the conflict of Lucius Clay was written by the Civil Service Commission?

Mr. UNGER. Yes, sir. It is reflected in the first paragraph of that document.

Senator SPECTER. Mr. Coleman, have you had a chance to take a look at this?

Mr. COLEMAN. I have not seen that at all. I have the Van Dusen testimony; I wish you would read it. The issue was that Mr. Unger wanted to be chairman and Lucius Clay was suggested as chairman. Mr. Van Dusen stated he is willing to come here under oath and state that Mr. Unger wanted to be chairman and therefore said that Gen. Lucius Clay had a conflict.

Senator SPECTER. I have read Mr. Van Dusen's statement this morning. He does make that statement. But it would be helpful to me if you would take a look at this letter, because with the passage of time it is possible that Mr. Van Dusen was incorrect. I think it may be necessary to have him come testify and to have another——

Mr. COLEMAN. Nothing in that letter in any way negates what Mr. Van Dusen says. As you know, in dealing with the Government, as to who actually makes the request may be different from the person who has the interest and wants to get the job done.

Senator SPECTER. I do not know that, Mr. Coleman. That is what I am trying to find out.

This statement by Mr. Van Dusen says that Mr. Unger wanted to be chairman of the board of FNMA. And then it says:

> [A]fter he learned of General Clay's selection for the position which he had himself aspired to, Mr. Unger gave his legal opinion that General Clay had a conflict of interest which would preclude his service. This was a source of considerable embarrassment. As I recall it, it was necessary to request and obtain from the Office of Legal Counsel in the Department of Justice an opinion that there was no disqualifying conflict.

His language here, Mr. Coleman, as I recall it, is somewhat qualified. Mr. Unger now contends that this letter shows that this document, which I have not examined but have just seen, shows that he, Mr. Unger, did not write the opinion letter on Lucius Clay.

Mr. COLEMAN. I think it suggests, as I said, Mr. Van Dusen was prepared to come in at the time when this hearing was originally set. It was then changed. I assure you he is prepared to come in at a time mutually convenient, and he can testify as to what happened.

Senator SPECTER. Well, all right, let me pursue this document which you just handed me. Mr. Unger, which I am just now looking at. Perhaps you can be of assistance to me. What is there on the face of this document which establishes, as you contend, that somebody else wrote this letter concerning Lucius Clay's alleged conflict of interest?

Mr. UNGER. In the first paragraph, the way this is broken out, the sentence that starts, Mr. Carl Ruediger, Assistant General Counsel, Civil Service Commission, on the basis of the facts outlined by Mr. Unger in a letter dated to him June 9, concluded that specified outside activity on the part of several of the directors of Fannie Mae established a conflict of interest under Executive Order 11222 and would violate 18 USC 208.

That specifically says that the opinion came from the Civil Service Commission, Mr. Carl Ruediger, I guess; I do not know how to pronounce it.

Senator SPECTER. Whom is this letter from?

Mr. UNGER. It is from Mr. Rehnquist, who was in Office of Legal Counsel in the Department of Justice. It is directed to Mr. Van Dusen, but it refers to my earlier referral of the same issue to——

Senator SPECTER. All right. Well, I am beginning to piece it together.

[Aforementioned letters were subsequently supplied for the record:]

Department of Justice
Washington, D.C. 20530

July 10, 1970

The Honorable
Richard C. Van Dusen
Under Secretary
Department of Housing and
Urban Development
Washington, D. C. 20410

Dear Mr. Van Dusen:

Your letter to me of July 9 reiterated the earlier request of Sherman Unger, General Counsel of the Department of Housing and Urban Development, for the opinion of the Department of Justice as to whether the provisions of the federal conflict of interest statute found in 18 U.S.C. 208 apply to the directors of the Federal National Mortgage Association. That section, in the cases in which it is applicable, makes criminally punishable the participation by an officer or employee of the Executive branch of the United States government or of an independent agency of the United States in any particular matter in which he has a financial interest. Mr. Carl Ruediger, Assistant General Counsel of the Civil Service Commission, on the basis of the facts outlined by Mr. Unger in a letter to him dated June 9, concluded that specified outside activity on the part of several of the directors of FNMA "establishes a conflict of interest" under Executive Order 11222, */ and would violate 18 U.S.C. 208. After the most careful review of the facts submitted by Mr. Unger, additional factual information furnished by FNMA, and material bearing on the legislative history of the Housing Act of 1968, I find myself obliged to differ from Mr. Ruediger's conclusion. I am of the opinion that the directors of FNMA are neither "officers or employees of the Executive branch of the United States Government" nor are they officers or employees of an "independent agency of the United States". This being the case, the necessary predicate for the application to them of 18 U.S.C. 208 is absent, and they are not subject to its provisions. Executive Order 11222 includes in its coverage "any officer or employee of any agency", and defines "agency" as "any Executive department or any independent agency or any government corporation"; I

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*/ This Executive Order implements the provisions of this statute, and is designed to prohibit action by government employees which would either result in, or create the appearance of, impropriety -- action such as using public office for private gain, giving preferential treatment to any person, or otherwise adversely affecting the confidence of the public in the integrity of the government.

have likewise concluded that the directors of FNMA are neither officers nor employees of an "agency" within the terms of the Executive Order.

The basis for my conclusion, set forth in greater detail hereafter, is that by the Housing Act of 1968 Congress reconstituted the then existing FNMA, assigning certain of its functions to the GNMA, created by the Act and described in the Act as a "wholly owned government corporation", and assigning other functions of the former FNMA to a reconstituted FNMA, created by the Act and described therein as "a government sponsored private corporation". Analyzed either in terms of statutory language or of function, the present FNMA is not a part of the Executive branch, it is not an independent agency of the United States, and it is not a government corporation. This conclusion is buttressed by the fact that the statutory provisions for the election of directors quite clearly contemplate, if they do not require, selection of directors who are bound to have nongovernmental interests which are affected by many of the actions which would be taken by the Board, and whose participation in Board activities could be seriously limited if the conflict of interest statute or Executive Order were held applicable to them.

Gov. Priv. Corp

Mr. Ruediger used the following language in reaching his conclusion that FNMA is within the language of both the statute and the order:

> ". . . FNMA is an entity in the Executive branch of the government which, although substantially controlled by private stockholders, is performing a federal function under significant governmental control so as to be a quasi-governmental organization."
>
> ". . . Section 705 of Executive Order 11222 which prescribes standards of ethical conduct for government officers, defines an "officer" as an "officer . . . of an agency" and "agency" is defined in the same section to include a government corporation which FNMA basically is."

While it is perfectly clear that FNMA is subject to a number of government controls, and while it may for some purposes be described as a "quasi-governmental organization", I do not believe that these facts are determinative as to whether it is covered by either the statute or the Executive Order.

Under 18 U.S.C. 208, the inquiry is whether FNMA is a part of the "executive branch", or whether it is "an independent agency of the United States"; the Executive Order, in addition to substantially similar language respecting the Executive branch and independent agencies, adds to its coverage any "government corporation". I believe it is reasonably clear from both the language of the Housing Act of 1968, and the legislative history of that Act, that FNMA falls within none of these three categories.

The status of FNMA at present is determined by the provisions of its 1954 Charter Act, 58 Stat. 612, as amended by Title VIII of the Housing Act of 1968, 82 Stat. 536. Prior to the extensive amendments affected by the 1968 Act, which became fully effective on May 21, 1970, FNMA was defined by statute as a "body corporate" in the Department of Housing and Urban Development (12 U.S.C. 1964 ed. 1717(a)), and it was listed in 31 U.S.C. (1964 ed.) 846 as a "wholly" owned government corporation". Prior to the 1968 revisions, FNMA performed three separate functions in connection with the federal housing assistance program: "Secondary market operations" in the mortgage industry (12 U.S.C. 1719), "special assistance" (12 U.S.C. 1720), and "management and liquidation" (12 U.S.C. 1721). The agency's Board of Directors consisted of the Secretary of Housing and Urban Development and four persons appointed by him, who were either officers or employees of FNMA, of the immediate office of the Secretary, or of some other department or agency of the federal government. 12 U.S.C. (Supp. III) 1723.

The 1968 amendments to the charter made sweeping and significant changes. The "special assistance" and "management and liquidation" functions were transferred to a newly created agency called Government National Mortgage Association (GNMA), while the "secondary market operations" were retained by FNMA. 12 U.S.C. (Supp. V) 1716(b). While the management of the newly created GNMA is completely under the control of the Secretary of Housing and Urban Development (12 U.S.C. (Supp. V) 1723), the management of FNMA was drastically altered. It now has fifteen directors, five of whom are appointed by the President, while the remaining ten are elected by the holders of the common stock of the corporation. The directors all hold office for a year, and all are subject to removal by the President for cause. Of the directors appointed by the President, at least one is to be from the home building industry, one from the mortgage lending industry, and one from the real estate industry. 12 U.S.C. (Supp. V) 1723(b).

The 1968 Act retained a substantial amount of control over FNMA in the Secretary of Housing and Urban Development. See, e.g., 12 U.S.C. (Supp. V) 1723a(h). The general counsel of FNMA advises us, however, that the United States no longer has any financial investment in FNMA.

The legislative history of these provisions of the 1968 Act clearly show the intent of Congress to reconstitute FNMA as an entity quite different from the one which had previously borne the same name. Indeed, the 1954 Charter Act provided that as soon as practicable provision should be made to carry out the secondary market operations of FNMA "by a privately owned and privately financed corporation". 12 U.S.C. (1964 ed.) 1718(g). House Rep. 1429, 83d Cong., 2d Sess., p. 19, explained thi. subsection as envisaging legislation which would provide for the transfer of "control and management of the secondary operations to the private owners of the outstanding capital stock."

President Johnson's Housing Message of February 22, 1968, which provided a substantial part of the impetus for the 1968 legislation, stated:

> "I propose legislation to transfer the secondary market operation of the Federal National Mortgage Association on an orderly basis to complete private ownership". Public Papers of the Presidents: Lyndon B. Johnson, 1968-1969, Book I, p. 248 at 260.

The House Committee Report on the Amendatory Act of August 1, 1968 (House Rep. 1585, 90th Cong. 2d Sess.) states that the "principal" change in the statutory provisions affecting FNMA

> "would be in fulfillment of the congressional intent expressed fourteen years ago in section 303(g) of the Federal National Mortgage Association Charter Act . . ." (At p. 68).

After explaining the functions and status of GNMA the report continues:

> "The other corporation, which will become entirely privately owned and which will operate the secondary market operations, will be known as the Federal National Mortgage Association (FNMA). The new FNMA would be a government-sponsored private corporation, regulated by the Secretary and would have a status analagous to that of the Federal Land Banks and the Federal Home Loan Banks." (At p. 69).

The regulatory powers of the Secretary mentioned in the preceding quotation are explained in the report as follows:

> "It is the intent of the Committee that the regulatory powers of the Secretary will not extend to FNMA's internal affairs, such as personnel, salary, and other usual corporate matters, except where the exercise of such powers is necessary to protect the financial interest of the federal government or is otherwise necessary to insure that the purposes of the FNMA Charter Act are carried out." (At p. 71.)

The Housing Act of 1968 provided that GNMA should "remain in the government" (12 U.S.C. (Supp. V) 1716b), and that it "shall be in the Department of Housing and Urban Development". GNMA is also listed as a "wholly owned government corporation" in 31 U.S.C. (Supp. V) 846.

Conversely, the Act of 1968 contains no provision retaining FNMA "in the government" nor specifying that it shall be in the Department of Housing and Urban Development.

On the contrary, 12 U.S.C. (Supp. V) 1716b defines FNMA as "a government-sponsored private corporation", and it has been removed from the list of "wholly owned government corporations" embodied in 31 U.S.C. (Supp. V) 846. The 1968 Act expressly exempts FNMA from all of the provisions of Title V of the United States Code, dealing with government organization and employees, and specifically exempts it from Civil Service and Classification Laws except for purposes not here relevant.

On the basis of the foregoing statutory language and legislative history, it seems clear beyond argument that FNMA is neither a part of the "Executive branch" nor an "independent agency". On the issue of whether or not it is a "government corporation", so as to be within the terms of the Executive Order but not the statute, I have likewise concluded in the negative. The obvious difference in statutory treatment of GNMA (remaining in the government and the Department of Housing and Urban Development), on the one hand, and FNMA, on the other; the express reference to FNMA as a "government sponsored private corporation"; the removal by statute of FNMA from the list of "wholly owned government corporations"; the exemption of FNMA from all of the statutory provisions relating to government organizations and employees; and the fact that the majority of its directors are elected by stockholders, rather than appointed by the President, lead to the conclusion that FNMA is neither in fact nor in law a "government corporation".

The fact that the directors of FNMA are not full time public servants, but serve in much the same manner as outside directors of a private corporation so far as time is concerned, indicates that Congress might have significantly impaired the accomplishment of its intended purposes in the Housing Act of 1968 had it made FNMA a government corporation subject to federal conflict of interest statutes and Executive Orders. The provision for special representation on the Board of Directors from the home building industry, the mortgage lending industry, and the real estate industry suggests that these segments of the agency's clientele are intended to have special consideration in the deliberations of the Board of Directors. This notion is further implemented by the requirement of section 810(a)(3) of the Act, 12 U.S.C. (Supp. V) 1716, note, that the transition to the new privately owned FNMA would become effective only when not less than one-third of the corporation's common stock is owned by persons or institutions in those three industries. This is not to suggest that self-dealing by the directors is either invited or permitted, but it does indicate that at least three of the directors will be representatives of, and presumably financially interested in, industries inevitably affected by the actions of FNMA. Application of the stringent prophylactic provision of 18 U.S.C. 208 which Congress has applied to actual government officers could well be inconsistent with this form of representation on the Board of Directors of FNMA.

Needless to say, this conclusion does not in any way indicate that there are no ethical or legal restraints on the directors of FNMA. Both general corporate statutes and common law have traditionally imposed an obligation of fidelity and fair dealing on directors of non-governmental corporations, and the directors of FNMA are undoubtedly subject to such obligations. They are not, however, subject to the provisions of either 18 U.S.C. 208 or of Executive Order 11222.

Yours very truly,

William H. Rehnquist

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

UNITED STATES CIVIL SERVICE COMMISSION
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO
GC:LEG 1
YOUR REFERENCE

June 19, 1970

Honorable Sherman Unger
General Counsel
Department of Housing and
Urban Development
Washington, D. C. 20410

Dear Mr. Unger:

This refers to your letter of June 9, 1970, which makes inquiry as to possible conflict-of-interest situations that relate to some members of the board of directors of the Federal National Mortgage Association (FNMA).

Before responding to your inquiry, it is necessary to set forth certain basic understandings. The FNMA was created by Federal statute but is not an executive agency as defined in 5 U.S.C. 105.[1] There are 15 members on the board of directors of FNMA, 5 of whom are appointed by the President of the United States and the remainder of whom are elected by the common stockholders in FNMA. Any member of the board of directors may be removed from office by the President for "good cause". The board, among other powers, is authorized ", [w]ithin the limitations of law and regulation", to determine the general policies which govern the operations of the corporation. In addition, the board selects and appoints the president, vice president, and other officers of FNMA as may be provided for in the bylaws.

The Secretary of Housing and Urban Development has general regulatory power over FNMA and is authorized to make "such rules and regulations as shall be necessary and proper to insure that the purposes of this subchapter [subchapter III of chapter 13 of title 12, "National Mortgage Associations] are accomplished." (12 U.S.C. 1723a(h).) One of the purposes of the subchapter is to "manage and liquidate federally owned mortgage portfolios in an orderly manner, with a minimum of adverse effect upon the home mortgage market and minimum loss to the Federal Government. (12 U.S.C. 1716(c).) In addition, the Secretary may examine and audit the books and financial transactions of FNMA and the corporation may issue no stock obligation, security or other instrument without the prior approval of the Secretary. (12 U.S.C. 1723a(h).) It is also pertinent that the Secretary of the Treasury controls the volume and rate of interest of FNMA borrowings and obtaining resources through the sale of mortgage-backed securities.

The basic understandings set forth above support the conclusion that FNMA is an entity in the executive branch of the Government which, although substantially controlled by private stockholders, is performing a Federal function under significant Governmental control so as to be a quasi-Governmental organization. By reason of this conclusion, each member of the board of directors of FNMA appointed by the President

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1. 12 U.S.C. 1723a(d)(2) provides that "Except as provided in this subsection [which saved retirement benefits], the corporation shall not be subject to the provisions of title 5 [of the United States Code]."

of the United States would qualify as an "officer" as defined in 5 U.S.C. 2104 in the absence of 12 U.S.C. 1723a(d)(2), footnote 1 supra. That is, such a board member meets all the criteria in section 2104 as he is required by law to be appointed to a civilian position in the executive branch by the President, is performing a Federal function under authority of law, and is subject to the supervision of the President while engaged in the duties of his office.[2]

While these Presidential appointees are not "officers" for the purpose of title 5 by reason of 12 U.S.C. 1723a(d)(2), the fact that they otherwise fully qualify under the criteria for officers is persuasive that they are officers in the executive branch for conflict-of-interest purposes. Section 208 of title 18 relative to acts affecting a personal financial interest refers to "an officer * * * of the executive branch". Section 705 of Executive Order 11222, which prescribes standards of ethical conduct for Government officers, defines an "officer" as an "officer * * * of an agency" and "agency" is defined in the same section to include a Government corporation which FNMA basically is.

We are not unaware of 42 Op. Atty. Gen. No. 11 (October 25, 1962) which held that the fact that directors of the Communications Satellite Corporation are appointed by the President of the United States, by and with the advice and consent of the Senate, was not determinative as to whether they are officers of the United States. The Attorney General, after examining the nature of that corporation and its board of directors, held that the board members were not officers of the United States. There are, however, two important conditions regarding that corporation which the Attorney General stressed and which are entirely different from the conditions with respect to FNMA and its board of directors.

First, the Communications Satellite Corporation was expressly declared "not to be an agency or establishment of the United States Government". (42 U.S.C. 731.) With regard to FNMA there is no such express exclusion and, as shown above, there are several indicia that support the conclusion that FNMA is a quasi-Governmental organization. Second, the Attorney General referred to the tenure and duties of the Communications Satellite Corporation's board of directors and concluded that they held a private, rather than a public, office. On the other hand the members of the FNMA have a different tenure as they occupy what are actually temporary (one year appointment) positions and may be removed at any time by the President for good cause. Moreover, their duties -- the directorship of what has been termed a "Government sponsored private corporation"-- are more Government oriented than private oriented. We are, accordingly, of the opinion that 42 Op. Atty. Gen. No. 11 is not here controlling.

With respect to the members of the FNMA board of directors who are not appointed by the President of the United States, there is little doubt that they are not officers in the Government by reason of the fact that they are not "appointed" as required under criteria such as appear in 5 U.S.C. 2104 and 29 Comp. Gen. 363, 366 and 37 Comp. Gen. 138. However, this does not mean that the absence of an officer status places these elected board members in a category in which there are no Governmental considerations of ethical conduct or means to control actual conflicts of interest or the appearance thereof. As shown hereinbefore, all board members perform what is essentially a Federal or public function. Moreover, in apparent recognition of the public function performed by these board members, Congress gave the President of the United States express authority to remove them from office (both appointive and elective office) for "good cause". It would be incongruous to hold that action by a Presidentially appointed board member which is proscribed by law, Executive order, or executive branch regulation and which would constitute "good cause" for the removal of such a board member, would not be "good cause" for the removal of an elected board member. There can be no double standard for comembers of a single board of directors such as exists in FNMA. While the manner of their entry on the board is different, their conduct as board members must be judged by identical standards.

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[2] Supervision is established not only with respect to the Presidentially appointed members of the board of directors but with respect to all board members by reason of the President's express authority to remove any member of the board for "good cause" (12 U.S.C. 1723(b).) In addition, supervision is evidenced by the statutory controls over FNMA placed in the Secretary of Housing and Urban Development. (12 U.S.C. 1723a(h).)

We come now to the standards specifically applicable to the Presidential appointees on the FNMA board of directors and which, as explained above, are equally applicable under the Presidential control authority to the elected board members.

Section 208 of title 18 makes it a criminal offense for an officer of the Government to participate personally and substantially in his official capacity by approval, disapproval, or recommendation in a ruling or other determination or other particular matter in which he knows that he, his partner, or an organization in which he is an officer or director has a financial interest.

Executive Order 11222 and the regulations of the Civil Service Commission pursuant thereto (5 CFR Chapter 735) prohibit an officer of the Government who is a "special Government employee"[3] from any use of his office that is motivated, or appears to be motivated, by a desire for private gain for himself or any organization with which he has business or financial ties. Such an officer is also prohibited from using his office in any way to coerce, or to give the appearance of coercing, another person to provide a financial benefit to an organization with which he has business or financial ties. Furthermore, by reason of 5 CFR 735.301, under which the appropriate ethical conduct standards applicable to regular officers may be made applicable to "special Government employees", such an officer is prohibited from taking any action -- whether or not specifically prohibited -- which might result in, or create the appearance of using public office for private gain, giving preferential treatment to any organization, losing complete independence or impartiality of action, or affecting adversely the confidence of the public in the integrity of the Government. In addition, an officer is prohibited from having a direct or indirect financial interest that conflicts substantially, or appears to so conflict, with his duties and responsibilities as an officer of the Government.

As stated in your letter of June 9, a conflict of interest question exists with regard to the following situations:

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[3] A "special Government employee" is defined as an officer or employee who serves for not to exceed 130 days during any 365-day period under a temporary appointment either on a full-time or intermittent basis. The members of the FNMA board of directors serve under one year appointments (these are generally regarded a temporary for civil service purposes) and their service is intermittent.

- Charles P. Landt, a Presidentially-appointed FNMA board member, is President of Cameron-Brown Company which (1) owns 6,989 shares of FNMA stock, and (2) was paid $273,931 during 1969 for servicing FNMA home mortgages.

- Julian H. Zimmerman, a Presidentially-appointed FNMA board member, is President of Lumbermen's Investment Corporation which (1) owns 2,442 shares of FNMA stock, and (2) was paid $237,279 during 1969 for servicing FNMA mortgages.

- Lloyd E. Clark, a Presidentially-appointed FNMA board member, is President of Alodex Corporation which, through subsidiaries, own 266 shares of FNMA stock.

- Lucius D. Clay, an elected board member, is a senior partner in Lehman Brothers which is the sole owner of Lehman Commercial Paper, Inc., which was paid $245,233 during 1969 to market FNMA short-term discount notes.

The fact that some members of the FNMA board of directors are officers in private business concerns that earn substantial amounts by servicing FNMA mortgages or by marketing FNMA short-term discount notes establishes a conflict of interest under the standards set out in Executive Order 11222 and 5 CFR Part 735. While we are without jurisdiction to make conflicts interpretations under the criminal code (that is reserved to the Department of Justice), there is every reason to believe that if the payments described were continued there would be an obligation under 28 U.S.C. 535 to refer the matters to the Attorney General as information indicating a violation of 18 U.S.C. 208.

The above conclusions are based on the fact that FNMA board members control not only the general policies of the corporation but the officers of the corporation who arrange the business relationships with the private business concerns in which these board members hold positions. The financial-gain facet of such an arrangement is obvious and appearance of using public office for private gain is one that could very well adversely affect the confidence of the public in the integrity of the Government. We hasten to add that none of the foregoing implies intentional wrongdoing on the part of any individual. This is a case, as is so frequently the case in the area of ethical conduct, in which the conflict situation is created with no wrongful intent but the fact of its existence and its appearance are as damaging as though malice were present.

The ownership of FNMA stock by private business concerns in which some FNMA board members hold offices is far less serious than the direct financial profit situation discussed above. While one could argue that it is common place for members of private corporations to own stock in the corporation in which they serve the situation in Government is different. Using the rationale in 18 U.S.C 208, if the FNMA board members take any action in that capacity which affects the financial interests of the private business concerns in which they hold office, they may be in technical violation of the statute. Needless to say, as those private business concerns own FNMA stock the board members' official actions can not do other than affect the financial interests of those private concerns which are FNMA stockholders. Accordingly, the stock-holding matter is also contrary to the standards in the Executive order and 5 CFR Chapter 735.

I hope the foregoing will aid in clarifying the conflicts questions you have. If I can be of further assistance please let me know.

Sincerely yours,

Karl Ruediger

Karl Ruediger
Assistant General Counsel

cc: Harry S. Flemming
Special Assistant to the President

Senator SPECTER. So, this sentence says then that Mr. Carl Ruediger, Assistant General Counsel of the Civil Service Commission, on the basis of facts outlined by Mr. Unger to him in a letter dated June 9, concluded that specified outside activity on the part of several directors of FNMA, "establishes a conflict of interest under Executive Order 11222, and then after a most careful review of the facts submitted by Mr. Unger." Well, is the distinction which you are seeking to make here that the letter was submitted by the Assistant General Counsel of the Civil Service Commission on the basis of facts outlined by you, as opposed to your opinion in the letter?

Mr. UNGER. I did not render an opinion. I was asked to render an opinion. I outlined the facts to the Civil Service Commission and said, you render an opinion; I don't want to be involved. I was serving on the Board at the time. As a matter of fact, I think I was at the time Chairman of Fannie Mae.

Senator SPECTER. Does this committee have a copy of your letter?

Mr. UNGER. No, sir, and I do not know if I do.

Senator SPECTER. Would you see if you can find that letter?

Mr. UNGER. The letter to the Civil Service Commission?

Senator SPECTER. The letter which you sent to Mr. Ruediger.

Mr. UNGER. I will do my very best. I am not optimistic that I would have kept that kind of file.

Senator SPECTER. The issue appears to be that Mr. Van Dusen says you wrote the letter, and you submit that Ruediger wrote the letter, but it was based upon facts submitted in the letter from you to Ruediger. It would be helpful at least to me if I could see both Ruediger's letter and your letter, Mr. Unger. We will attempt to find it through the committee. If you would help us, I would appreciate it.

Mr. UNGER. I have also asked the Justice Department to try to find something more than their computer printout.

Senator SPECTER. Thank you, Mr. Chairman.

Senator **Hatch**. Thank you, Senator.

I wish to address the second allegation that Mr. Coleman and his committee brought out. That one involved your making suicide threats following a stormy departure from a high-level position at the American Financial Corp. How would you respond to this?

Mr. **Unger**. I am delighted to respond to it, Senator. And I would like to add that I may want to have a submission on my departure from HUD. The former President may have some memory of it, and maybe I can find out something from him as well, since he appointed me.

Senator **Specter**. We would be glad to hear from anybody, Mr. Unger.

Mr. **Unger**. On my departure from American Financial Corp.?

Senator **Hatch**. Right.

Mr. **Unger**. My departure from American Financial Corp., occurred in essentially July 1972. The agreement to go our separate ways was mutual. I really was not comfortable in a corporate atmosphere. What happened after we reached that agreement was that there were certain negotiations for stock warrants that I held and stock options that I owned.

During these agreements, a young lawyer by the name of Kreider, a then-young lawyer by the name of Kreider was given the task of negotiating me down to a price that I thought was unfair and unreasonable. I did at one time invite him to leave my office. I said I was not negotiating with him. I owned them. I was not going to sell them at that price. I had what is called a piggyback right to go public with them at the next filing with the SEC of American Financial, and I proposed to do that and sell them in the open market for market value.

I was also preparing, because they were refusing other things, a lawsuit against American Financial on my departure.

There was some acrimony between Mr. Kreider and myself. I might add that shortly thereafter I sat down with Carl Lindner, who was chief executive officer of that company. We sat down, and within 15 minutes resolved the issue of the value of the warrants to my satisfaction. We shook hands and have stayed friends. Mr. Lindner has written—shortly after that, Mr. Lindner wrote me a letter of recommendation, which I would like to submit to the committee.

Senator **Hatch**. Without objection, we will put that in the record.

[Material referred to follows:]

AMERICAN FINANCIAL CORPORATION
ONE EAST FOURTH STREET ★ CINCINNATI, OHIO 45202 ★ TELEPHONE AREA CODE 513, 579-2121

September 25, 1972

TO WHOM IT MAY CONCERN:

Sherman Unger was employed by American Financial Corporation to assist us in developing our homebuilding business and establishing us in the mortgage insurance field.

At the time of his employment, Mr. Unger brought to us both legal expertise as a practicing attorney and experience in all phases of housing from his government service. Further, he had a broad range in business, all of which assets coalesced in profitable performance on our behalf.

Now that Mr. Unger has achieved the goals and objectives we mutually set, we are pleased to recommend him for your consideration.

Yours truly,

AMERICAN FINANCIAL CORPORATION

Carl H. Lindner,
President

ml

Mr. UNGER. I would point out that the Kreider and Berghaussen affidavits were made 6 years after these two alleged separate events. And I find it very peculiar in human life, anything as dramatic as these two affidavits would attempt to portray, that there would be no contemporaneous recording of them in any way. A security officer, in particular, I think, if he had observed the things that Mr. Berghaussen remembered 6 years later, would have made some sort of report somewhere. I would think that a young associate in a law firm, if he had gone through the experience Mr. Kreider outlines in his affidavit, would have made some sort of memorandum to the file.

These affidavits appeared for the first time when I had filed an application to substitute myself as counsel in a matter against American Financial.

They were shown to me in the counsel's office of American Financial. I was told if I would withdraw my application, they would not go public with these affidavits. I personally considered that to be blackmail. I had an obligation to my client. I was both offended by them and thought that they were bluffing. They were absolutely false affidavits.

I went back to my office, proceeded to try my case my way. I filed a rather lengthy affidavit, which I would like to submit to the record, detailing exactly my departure from American Financial, the negotiations for the warrants, the events with Mr. Kreider.

Senator HATCH. Without objection, we will put that in the record at this point.

[Material referred to follows:]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Richard G. Donohoo, et al.,
Plaintiffs,
v.
American Financial Corporation, et al.,
Defendants.

No. C-1-76-277

Robert Helfand, et al.,
Plaintiffs,
v.
Carl Lindner, et al.,
Defendants.

No. C-1-76-288

Harry Lewis,
Plaintiff,
v.
Carl Lindner, et al.,
Defendants.

No. C-1-76-291

AFFIDAVIT OF SHERMAN E. UNGER

State of Ohio)
) SS.
County of Hamilton)

I, Sherman E. Unger, being first duly sworn state as follows:

1. I have been admitted to the practice of law in the State of Ohio, the District of Columbia and the United States District Court for the Southern District of Ohio, and maintain law offices at 2724 DuBois Tower, Cincinnati, Ohio 45202, and at 1776 F Street, N.W., Washington, D.C. 20006.

2. I have been since prior to June, 1972, and

continue to be, a shareholder in American Financial Corporation (AFC) and either an owner of debentures or common stock in a subsidiary of AFC.

3. In late December, 1970 or early January, 1971, Carl Lindner contacted me and requested that we meet to discuss my possible employment by AFC. After several meetings with Mr. Lindner, other officers of AFC, and Charles Keating, Jr., the senior partner of the law firm of Keating, Muething & Klekamp (KM&K), it was agreed that I would be employed as a vice president of AFC. I was to commence work February 1, 1971 and to be paid $60,000.00 per year, to be granted 7,500 options for AFC common stock under its current stock option plan, and to purchase 7,500 warrants at a cost of $4.80 per warrant, to acquire AFC stock. As a further inducement of my employment, it was agreed that my purchase of the warrants would be financed by The Provident Bank.

4. I did commence work on February 1, 1971, and when I relied upon the commitment to finance my warrants I was required to terminate my banking relationship with another Cincinnati bank and to pay The Provident Bank the maximum legal rate of interest, which was at that time more than two percent over prime rate, and accordingly on February 19, 1971 I borrowed $35,000 from The Provident Bank and repaid a note in the amount of $34,500 at another banking institution.

5. My primary responsibility while with AFC was the management, development and expansion of Liberty Mortgage Insurance Company, an insurer of private mortgages with its principal place of business in Springfield, Illinois. At no time during my employment with AFC or Liberty Mortgage did I participate in the acquisition of real estate nor was I called upon to

participate as a lawyer on behalf of the corporations. I have never been requested to nor have I ever, rendered a legal opinion or advice to AFC or Liberty Mortgage during the course of my employment. At no time during my employment at AFC or Liberty Mortgage did I acquire any information, or participate in any transactions, which form the subject matter of this litigation. Further, I do not find any reference to my sale of warrants to AFC among the allegations of the consolidated complaint filed in this cause.

6. During February, 1971 I inquired several times concerning my warrants and was for the first time informed they would not come from AFC but were being held by Donald Klekamp, a partner of KM&K. Thereafter, I was instructed to pay Mr. Klekamp $35,846.80 for 7,500 warrants and told in addition I must pay him $446.09 "interest" in excess of the purchase price. I made these payments by check numbers X103 and X104 on my new account, number 9015 886, at The Provident Bank and subsequently received my warrants.

7. Prior to June, 1972, my warrants had been increased to 7,675 shares by virtue of their anti-dilutive provisions due to additional common stock being issued by AFC.

8. In early June, 1972, I was asked to attend a meeting with Carl Lindner and Charles Keating, Jr., who was at that time the senior partner of KM&K. At that meeting I was told by Mr. Lindner that my services were no longer required by AFC, but that I would be paid through December 31, 1972. Mr. Keating suggested I use the time to look for another position. I asked about the status of my warrants, bank loan, and options, and Mr. Lindner said The Provident Bank would carry the

loan through December 31, 1972 and perhaps the following year. Mr. Lindner then said since Charles Keating had to leave we would "talk further tomorrow" and the meeting concluded. I immediately informed my secretary of the conversation.

9. I was unable to see Mr. Lindner for the next two weeks.

10. On June 22, 1972 I received a letter from Mr. Lindner, attached hereto, marked Exhibit A and made a part hereof, dated June 2, 1972, pertaining to the registration of my warrants. Paragraph 8B of my warrants, to which the letter refers, is attached hereto, marked Exhibit B and made a part hereof. The following day, on June 23, 1972, I notified Mr. Lindner, President of AFC, that as provided in his letter received the prior day, I wished to register my warrants pursuant to the provisions contained therein. A copy of said letter is attached hereto, marked Exhibit C and made a part hereof.

11. On June 29, 1972 I was able to meet with Mr. Lindner and asked whether he had any objection to my registering the warrants. Mr. Lindner stated he knew nothing about my request and would get back to me.

12. A few days after my meeting of June 29, 1972 with Mr. Lindner, Bill Martin, a vice president of AFC, met with me, requested I turn over all my responsibilities in Liberty Mortgage Insurance Company to him, and for the first time suggested that the anti-dilutive provisions of my warrants would not protect me after the AFC two-to-one split on common stock, suggesting I did not own warrants in the amount of two times 7,675 or 15,350, but only owned 12,432 warrants. Mr. Martin was unable to explain to me how his interpretation of the anti-

dilutive provisions of the warrants would in fact have a dilutive effect. Mr. Martin stated he wanted to resolve my relationship with AFC and stated that AFC would pay me $10.00 per warrant for 12,482 warrants and a lump sum salary to cover the period through December 31, 1972. Mr. Martin stated he would not discuss my options nor a loan to cover the acquisition of my options until I agreed to his other demands. I advised Mr. Martin I wanted time to consider his offer and that I was about to depart on a two-week vacation with my son.

13. On July 7, 1972 I independently arranged financing to exercise my stock options and presented to Mr. Lindner my check in the amount of $50,625.00 and exercised my options in a letter to Mr. Lindner of that date. A copy of that check is attached hereto, marked Exhibit D and made a part hereof. A copy of my letter to Mr. Lindner exercising my options is attached hereto, marked Exhibit E and made a part hereof. On the same date I wrote Mrs. Sandra Heimann, Secretary of AFC, again requesting that my warrants be registered. A copy of that letter is attached hereto, marked Exhibit F and made a part hereof. Thereafter, I departed for a two-week vacation with my son.

14. During my vacation Charles Keating became Executive Vice President of AFC.

15. I returned from my vacation on July 24, 1972 and the following day Mr. Martin discharged my secretary and advised me I would have to be out of my office by the following Monday, July 31. On July 31 I was moved to a smaller office on a different floor. On the same day I talked with Charles Keating, then Executive Vice President of AFC, concerning the method of calculating

my warrants in light of the two-to-one stock split. Mr. Keating said he did not understand the warrants either and suggested I talk with Gary Kreider of the firm of KM&K. Later that day I talked with Mr. Kreider and he was unable to explain to me how the anti-dilutive provision of my warrants in fact diluted the warrants. I then asked Mr. Kreider about the progress of registering my warrants and when I would receive the certificates for my options previously exercised and due on July 24. Mr. Kreider stated he knew nothing about my request for registration but felt the certificates would be ready shortly.

16. The following day, Tuesday, August 1, Mr. Kreider asked to see me in his offices at KM&K. I met with him at 11:20 a.m. and Mr. Kreider advised he had talked to Carl Lindner and Charles Keating and they felt it best that we terminate our relationship as of August 31, 1972; that Carl Lindner did not want to register the warrants but wanted to buy them and that Mr. Lindner wanted me to agree to have a broker review the warrants as though they were registered and come up with a fair price. Mr. Kreider also advised me that I was to vacate my present office by August 15, 1972. I advised Mr. Kreider I understood I was to be paid through December 31, 1972 and Mr. Kreider stated he knew nothing about that; he only knew of payment through August 31, 1972. Mr. Kreider also said AFC would want a release from me.

17. At lunch that day I met with a prominent local corporate attorney, reviewed the matter and the terms of the warrants and he informally advised me he had no doubt as to the correctness of my interpretation of the anti-dilutive provisions.

18. After lunch on August 1, Mr. Kreider called me and agreed that I was to receive a lump sum salary payment through December 31, 1972 and proceeded to discuss the price AFC would pay for my warrants. I advised Mr. Kreider there still seemed to be two open questions: (1) the legal interpretation of the warrants to determine the number, and (2) the economic effect of the added value when the warrants were registered. Mr. Kreider said he would only discuss the added value of registration. He further stated that the stock I acquired through exercising my options was transferred effective that date and asked how I wanted my certificates. I advised him I wished three 1,000 share certificates, one 500 share certificate and one 250 share certificate. Mr. Kreider said I would have the certificates that same day or early the following morning.

19. The following day, Wednesday, August 2, Mr. Kreider came to my office and stated the following: (1) that "Carl Lindner wants to buy your warrants for $8.00 per share," not the $10.00 per share previously offered, and that the number of warrants was to be based upon their interpretation of the anti-dilutive provisions; and (2) that I must pay off my loans at the Provident Bank; and (3) that if I did not accept this offer before 5:00 p.m. on that day I would, (a) be fired that day, effective August 15, (b) be denied the termination pay previously agreed upon, and (c) that he, Kreider, would refuse to deliver the certificates provided for under my option agreement and would break the option agreement. I told Mr. Kreider I did not wish to sell my warrants but wanted to hold them and keep the loan until I could arrange other financing. Mr. Kreider finally stated that might be alright if I

withdrew my request to register the warrants and signed a release concerning the warrant calculations.

20. Mr. Kreider said he would check into these matters and contact me after lunch.

21. After lunch on Wednesday, August 2, Mr. Kreider advised me that AFC would not register my warrants and that I could not keep my warrants but must accept the AFC offer or I would receive no separation pay, my options would not be honored and The Provident Bank would call my loan. I advised Mr. Kreider he was exerting extreme economic coercion upon me that might have a detrimental effect on my family and minor children and that I refused to submit to coercion. Heated words were exchanged between Mr. Kreider and myself.

22. Shortly thereafter, on the same afternoon, a bank security officer dropped by "to see if everything was alright." He visited with me for a few minutes and departed. Shortly after the security man's departure Charles Keating called to say Mr. Kreider was "only negotiating" and that the 5:00 p.m. deadline was withdrawn. Thereafter, I departed my office and caught a 4:25 flight to Washington, D. C. to attend a previously arranged dinner.

23. Upon my return from Washington the following week I formally consulted a local attorney concerning my rights as to registration of my warrants, to receive my options previously exercised and paid for, a reasonable interpretation of the anti-dilutive provisions of my warrants and my right to the agreed upon termination pay. Shortly thereafter I was contacted by Carl Lindner who advised that Charles Keating had been relieved of the responsibility of negotiating on behalf of AFC and that Mr. Lindner would like to meet with me.

24. Mr. Lindner and I subsequently had a meeting in which he would not agree to my interpretation that I owned 15,350 warrants for which I had a request to register and for which I wanted $10.00 to $12.00 per warrant, but was agreeable to using the AFC figure of 12,482 warrants and stated AFC would pay me $12.00 a warrant or $149,784. I agreed to accept that offer and closing was set at the Provident Bank for Monday, August 14.

25. On Monday, August 14 I met with officers of The Provident Bank and was presented with an American Financial Corporation payroll check paying me through the period December 31, 1972, the stub of which is attached hereto, marked Exhibit G and made a part hereof. In addition, I was presented with check number 1677 drawn on the law firm of Keating, Muething & Klekamp, Special Account, dated August 14, 1972, in the amount of $149.784.00 which I was directed to make payable to the order of The Provident Bank, which I did. The Provident Bank deducted payments of interest and notes in the amount of $67,694.00 and presented to me its check number 855411 in the amount of $82,089.00 which I deposited in my Provident Bank checking account along with the net amount of my payroll check of $17,068.20. I thereupon executed a direction to The Provident Bank, which was presented to me by a representative of The Provident Bank, requesting that it deliver my warrants to AFC, Attention Charles H. Keating, Executive Vice President. A copy of that direction is attached hereto, marked Exhibit H and made a part hereof. My total salary for 1972 included severance pay through December 31, 1972.

26. The first time I heard of American Financial

Investment Associates (AFIA) was when I read the publicity surrounding the instant litigation. All of my transactions concerning my warrants were concluded in the offices of The Provident Bank on August 14, 1972. I was lead to believe during the entire time, and did believe, that I had sold my warrants to AFC.

27. It was only after reading the affidavit of Mr. Evans that I became aware that AFIA had subsequently come into the possession of my warrants.

28. I have no knowledge of how the warrants came into the possession of Mr. Klekamp or why I was directed to purchase them from him. I have no knowledge of why my warrants were paid for by a check from KM&K. I have no knowledge how the warrants I directed to be delivered to AFC came into the possession of AFIA. I have no knowledge of the AFIA loan of $191,464.00 to purchase the warrants for which I was paid $149,784.00, nor do I know to whom the $191,464.00 was paid.

FURTHER AFFIANT SAYETH NAUGHT.

Sherman E. Unger
Sherman E. Unger

SWORN to before me and SUBSCRIBED in my presence this [illegible] day of [illegible], 1978.

Notary Public
[illegible] G. [illegible], Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration
Section 147.03 O.R.C.

Mr. UNGER. That was filed before the Kreider and Berghaussen affidavits were filed.

I submitted to the American Bar Association affidavits of William Seaman, who was the senior partner of my former law firm. William Ogden, with whom I was then living—we were both divorced at the time. We were sort of an odd couple, but we saw each other every day. We were old friends. We went to law school together. I submitted the affidavit of Joseph Hayden, of Jerry L. Cowan, of Judge Roettger, all people I was in contact with during that point, the period of my life, in 1972, that I was not suicidal. As a matter of fact, I was pleased with the way I resolved my departure as far as—I was glad to be out of the corporate world. I was satisfied with my sale with Mr. Linder.

Nothing occurred the way it is described in the Kreider——

Senator HATCH. You are saying the two affidavits came forth around 6 years later?

Mr. UNGER. Yes, sir.

Senator HATCH. And that these two people tried to prevent you from joining in that matter on American Financial Corp.

Mr. UNGER. Yes. Mr. Lloyd Cutler also wrote a letter dated November 2, 1982, to Mr. Coleman concerning the same people, American Financial, and their counsel. I would like to submit that for the record.

Senator HATCH. Without objection, we will put all of these letters in the record at this point.

[Material referred to follows:]

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November 2, 1982

PRIVATE AND CONFIDENTIAL

William T. Coleman, Jr., Esquire
O'Melveny & Myers
1800 M Street, N.W.
Washington, D.C. 20036

Dear Bill:

As you know, my support of Sherman Unger for nomination to the vacancy on the Court of Appeals for the Federal Circuit is based on my experience in working with him over the last 18 months and a general awareness of his earlier career as a trial lawyer in Cincinnati.

I understand that the principal concerns about his qualifications arise out of two affidavits filed in Donohoo v. American Financial Corporation (S.D. Ohio No. C-1-76-277), one signed by Gary P. Kreider of Keating, Muething & Klekamp and the other by Charles Berghaussen, a security guard employed by American Financial Corporation. I have now read these affidavits. Our firm has also had some personal experience with Kreider's law firm and American Financial Corporation.

Based on this reading and this experience, I do not believe the affidavits are worthy of belief. My reasons are as follows:

1. The affidavits describe events (and impressions about events) that occurred six years before the affidavits were signed.

2. The affidavits contain internal inconsistencies. For example, Kreider places the events and impressions in August 1972. Berghaussen places them in July 1972. Berghaussen's affidavit says that "Kreider informed me that UNGER indicated to him that UNGER had a gun." The Kreider affidavit mentions nothing about a gun.

3. Unger's own reply affidavit describes the same two conversations. It makes no reference to remarks about suicide, threats of violence or possession of a gun. Mr. Unger has advised me that no such statements were made and that he did not have a gun.

4. The affidavits were filed as part of an American Financial effort to have Unger removed as opposing counsel in a series of trials because of his former employment by American Financial. They were ignored by the judges who received them, and the effort to remove Unger was abandoned.

5. Our firm was retained by American Financial to handle the SEC aspects of a "going private" transaction in 1978 in which the Lindners, as offerors, and the Keating firm were conflicted. During this engagement, we worked with Mr. Kreider and other members of the Keating firm. Because of concern about the adequacy of disclosure and failures to consult with us before the issuance of critical press statements, we decided to withdraw from participation as counsel. While I did not personally work on the matter, I was fully involved in the decision to withdraw. As you know, firms like yours and ours do not reach such decisions lightly, especially when large amounts of current and potential future business are involved.

6. Our judgment on withdrawal was subsequently confirmed when the SEC instituted a related proceeding against American Financial and another against Keating, Muething & Klekamp for alleged misconduct in the firm's securities work for American Financial. The firm submitted an offer of settlement which the Commission accepted. As part of this acceptance, the Commission published its findings of facts and conclusions of law. Although the firm did not admit or deny the SEC's

findings, the firm did not challenge the Commission's Order containing its findings and imposing remedial sanctions. A copy of that Order is attached. Mr. Kreider, as you may know, is the principal securities lawyer in the Keating firm, and did much of its securities work for American Financial. Because of our own direct experience and the findings set forth in the SEC Order, I do not believe that Mr. Kreider's affidavit, apart from its internal deficiencies, should be given any significant weight.

It is also worth noting that for the past 18 months, Sherman Unger has served as General Counsel of a major Government department under conditions of great pressure, and that he has performed with distinction and without evidencing any sign of emotional instability or lack of coolness or judgment under fire. The high regard held for him by the Secretary of his department and his legal colleagues in the Government and the Washington Bar should tower far above the stale affidavit of a lawyer, subsequently disciplined for misconduct by the SEC, who was Unger's antagonist in a series of bitterly contested lawsuits.

Sincerely,

Lloyd

Lloyd N. Cutler

Mr. **Unger**. Then I would like to point out that Mr. Coleman said that I did not deny the affidavits properly, in his mind. However, I filed my own affidavit. One of the things that I do when I try a lawsuit is try not to let counsel for the other side dominate my suit and take me down blind alleys that are not productive. Arguing about those affidavits was not going to be productive to any interest of my client. I did, however—and I will point out and submit to the committee—in a brief state that the affidavits that Gary Kreider and Charles Berghaussen, which are attached, and challenge the factual accuracy as well as the relevance of these affidavits is strongly disputed by applicants. The facts stated in the affidavits conflict with those stated in the affidavit submitted by Sherman E. Unger, which was attached to applicants' initial memorandum.

Senator **Hatch**. We will put that in the record at this point also, without objection.

[Material referred to follows:]

AFFIDAVIT OF SHERMAN E. UNGER

District of Columbia)SS

I, Sherman E. Unger, being first duly sworn, state as follows:

1. This affidavit is provided to refute the statements made in affidavits by Gary P. Kreider and Charles Berghaussen filed in 1978 in the case of Donohoo v. American Financial Corporation, et al., No. C-1-76-277 (S.D. Ohio).

2. The statements in Gary P. Kreider's affidavit that during the course of conversations with him I was "extremely depressed and distraught" and that I indicated that I might take my own life are totally false.

3. The statements contained in the affidavit of Charles Berghaussen that during the conversation with him I was "very depressed and despondent"; that I "made specific threats against Carl H. Lindner and other AFC executives"; and that I "threatened to hang" myself are totally false.

4. I certainly never threatened to take my life as a result of my termination of employment with the American Finance Corporation, nor at any other time. Further, I neither threatened Messrs. Kreider nor Berghaussen. I had no gun in my possession at any time during the events described.

Further Affiant sayeth naught.

Sherman E. Unger
Sherman E. Unger

Sworn to before me and subscribed in my presence this 21st day of October, 1982

Joann R. Catalfamo
Notary Public
District of Columbia

My Commission Expires July 31, 198[illegible]

Mr. UNGER. The affidavits, while there was reference to these affidavits being sealed, the affidavits were open and public. They were brought up a second time in the case in which Judge Bell testified. In that case again, in the second case again I challenged by footnote the Kreider and Berghaussen affidavits. I would like to quote this to the committee:

"Unger disputes the factual content of the Kreider and Berghaussen affidavits. See documents No. 51 and 58 from Donohoo against American Financial."

Then I say: "Should this court conclude that defendants' allegations deserve more than cursory consideration, plaintiff requests an evidentiary hearing, at which time defendants would be required to prove their charges." And I cite my authority for that on these Berghaussen and Kreider affidavits.

I was willing to have an open court hearing on that. They are not factual. They are not true.

Now we come to an interesting point. And I am authorized by Jonathan Rose, Assistant Attorney General, to point out that I did in fact in 1982 sign an affidavit that said that they were not true. The reason I signed the affidavit in 1982—and Mr. Coleman made a great deal out of this yesterday—was that I waited so long. The reason I signed it, and I am authorized by Mr. Rose to say so, Mr. Rose drafted it and had the impression, after conversations with Mr. Coleman, that if I would sign such an affidavit, rather than just deny it in brief, as I had previously done, the matter would be resolved.

That is why that affidavit was signed at that time. It was drafted by the Justice Department and presented to me in that context. I would have been glad to sign an affidavit at any time that disagreed with it. It was an officer of the court, and in brief I said I disagreed with it. I asked for an evidentiary hearing on it.

What we have here Mr. Coleman raising a question of how I chose to deny the affidavit.

There was another point that he made that said I was kind of winding around Robin Hood's bush on this issue. Either Mr. Coleman did not understand my answer or I misunderstood his question. When I presented him–and I did give him these affidavits. When I presented him these affidavits, I also gave him Michael Kohn's letter that outlined exactly the occurrence and the timing. Clearly, I read the letter before I gave it to him. I could not have made the kind of mistake he attributes to me.

Senator HATCH. The ABA alleges that each of the affidavits that you have submitted relating to your own emotional stability at this time related to individuals who would have possessed utterly no knowledge of the circumstances of these threats. How do you respond to that allegation?

Mr. UNGER. I am not certain I understand the question, sir.

Senator HATCH. Well, as I understand it, the ABA says, with regard to the affidavits that you submitted, that they related to individuals who would have possessed utterly no knowledge of the circumstances of the threats. Can you respond to that?

Mr. UNGER. That is correct. In each instance, there were two people in the room. But the people would not have knowledge of me, they would have seen——

Senator Hatch. Were they even there?

Mr. Unger. There were two people. Kreider at one time was in my office, and I asked him to leave. Then the security guard came in, looked around, and he left. Yes, they were in my office individually.

They had the opportunity to say anything that took place in that office that they wanted to, and we are down to their word against mine.

But the other affidavits I submitted indicate that I was anything but suicidal then or any other time.

Senator Hatch. Senator Specter?

Senator Specter. These affidavits were submitted by two men, Kreider—I have been looking for the affidavits. What was your relationship with Kreider, Mr. Unger?

Mr. Unger. Kreider was representing American Financial, trying to negotiate down, if you will, the price of the warrants that I owned.

I might add, Senator, that these affidavits were filed in the first instance by John Muething, the senior partner of Keating, Muething and Klekamp, for whom Mr. Kreider worked.

Senator Specter. These affidavits were filed in 1978, as they show on their face?

Mr. Unger. Yes, sir.

Senator Specter. But it relates to conduct of a transaction in 1972?

Mr. Unger. Yes, sir.

Senator Specter. And the second affidavit is the affidavit of Charles Berghaussen?

Mr. Unger. Yes, sir.

Senator Specter. What relationship, if any, did you have with him?

Mr. Unger. He was a security guard in the building. He worked for American Financial.

Senator Specter. Does Berghaussen contend that he was present at the time you made the alleged threats to Kreider, or that he came in after the threats were made?

Mr. Unger. He came in individually, Kreider was not there—they were never there together.

Senator Specter. So, Berghaussen is essentially seeking to corroborate Kreider's contention? It is a prior consistent statement theory; Berghaussen is saying that Kreider told him about the threats?

Mr. Unger. As I read the affidavit, he is saying that this occurred to him individually.

Senator Specter. Occurred to him individually?

Mr. Unger. I have to reread the affidavit.

Senator Specter. Would you please?

Mr. Unger. I have it.

Yes, he says in paragraph four: Kreider informed me that Unger made threats against Carl Linder.

I might add, sir, if I may, and we are looking for it now, the committee has a letter from John Muething, the lawyer that filed these affidavits in the first instance, No. 1, supporting my nomination; No. 2, saying that, while he filed these, they were prepared for a highly contested piece of complex litigation; and that he feels that I have the intellect, the temperament, the stability to be a Federal judge and supports me.

Senator SPECTER. Well, Berghaussen also says here in paragraph 6:

> Unger also threatened to hang himself and let the world know that he had done so because of his alleged mistreatment by Carl Lindner, Charles Keating, Jr., and William Martin of AFC.

Mr. UNGER. I found that a little colorful.

Senator SPECTER. Are Kreider and Berghaussen alive today?

Mr. UNGER. I believe Kreider is alive today. I think Mr. Short or someone talked to Mr. Berghaussen.

Mr. SHORT. That is correct. Mr. Berghaussen has been contacted.

Senator SPECTER. Mr. Coleman, did you talk to Mr. Kreider?

Mr. COLEMAN. I talked to Mr. Kreider. Mr. Kreider informed me that the affidavit he took is absolutely true. He is available. He is a lawyer in Cincinnati.

I did not talk to Mr. Berghaussen. And I must say, when you look at the top, and every time I saw the county of Switzerland, I for some reason thought he was in Switzerland; but I recognize now that he lives in Indiana. I did not talk to Mr. Berghaussen, but I did talk to Mr. Kreider. Mr. Kreider stated that the statements in his affidavit are true and correct.

Senator SPECTER. Are there any other people at AFC who have any knowledge of this, Mr. Coleman, such as Carl Lindner?

Mr. COLEMAN. In my testimony, Senator, I mention the fact that I talked to Mr. Evans, who was general counsel of American Financial. He told me, if you look at pages 45 and 46 of my testimony, he told me that he believed the allegations, and the Berghaussen and Kreider affidavits were truthful, based upon what was perceived by them at that time. When he said that——

Senator SPECTER. You are talking about John Evans now?

Mr. COLEMAN. John Evans. I thought he was trying to tell me something, so I asked him to explain the comment. Mr. Evans said he did not mean to imply that the affidavits were not true. He stated that he believed Mr. Kreider was a truthful person who would not lie.

Senator SPECTER. How about Mr. Lindner, Mr. Coleman?

Mr. COLEMAN. Mr. Lindner, I tried to get him by telephone on at least seven different occasions. His secretary said he would come on the line, and he did not come on the line. Finally, after about 2 months, I got a call from Mr. Evans. Mr. Evans said that Mr. Lindner had told him that he wanted him, Mr. Evans, to speak to me. I have never spoken to Mr. Lindner. He would not speak to me. But he is still alive and available.

Mr. UNGER. I might add, Senator, if I could, that I have lived my life since 1972, and there are a lot of people that have testified that they have seen me under a great deal of pressure during this period of time. One disputed incident, I do not think, makes me emotionally unstable.

Senator SPECTER. The transaction occurred in 1972, and these affidavits were presented to you in 1978. And when you assert that they are blackmail, I think you are absolutely correct. Under those circumstances, they are blackmail. True or false, they are blackmail.

Mr. UNGER. I agree.

Senator SPECTER. I do not think truth is a defense to blackmail. Did you take any action thereafter?

Mr. UNGER. No. Did I sue them? No.

Senator SPECTER. Well, did you do anything about it? It is pretty reprehensible conduct.

Mr. UNGER. I certainly considered it, and I considered it in the time frame of my small firm and my practice, and concluded that it was in the best interest to serve my clients and not pursue my own personal——

Senator SPECTER. I am not saying you should have. I am only asking if you considered it.

Mr. UNGER. We discussed it. I think Mr. Kohn and I discussed it in exactly those cold terms, of blackmail, and recourse to the bar.

Senator SPECTER. Mr. Unger, you may prefer to answer this privately. If you do, I would be pleased to hear it privately. But when a question is raised concerning allegations of suicide, I think it would be relevant to know if you have been under psychiatric care.

Mr. UNGER. I am prepared to respond to that publicly. The answer is no.

Senator SPECTER. At no time since 1972?

Mr. UNGER. That is correct.

Senator SPECTER. Psychiatric or psychological counseling?

Mr. UNGER. I——

Senator SPECTER. There is nothing wrong with it if you have, but if you have not, it is, I think, somewhat probative.

Mr. UNGER. The only psychological thing that I have had, my wife and I have had some marriage counseling from time to time.

Senator SPECTER. Thank you, Mr. Chairman.

Senator HATCH. Thank you.

I think I will go on. You know, I have to agree. Even if these allegations, the first two, were true, I do not see why they should foreclose you from sitting on the Federal bench at this time.

I read the Washington Post this morning, it did not say very much about the people who came in and indicated that some of these things are not true. It bothers me a lot. Let me just go on.

Mr. UNGER. I would like to submit for the record—and I did find Mr. Muething's letter and affidavit of September 22, 1983, in which he says he has observed me in trial as chief counsel over the last 10 years, even though he filed the affidavits, he believes by reason and knowledge and observation that it is his opinion that Mr. Unger possesses the legal ability, the integrity, the personal temperament and judicial qualifications which qualify him for service on the Federal bench.

That is the man that filed the affidavits in the first place. That is the man that threatened me with the affidavits in the first place.

Senator SPECTER. He has filed a statement saying that you are fit for the bench?

Mr. UNGER. Yes, sir.

Senator SPECTER. May I see that?

Mr. UNGER. Yes, sir.

Senator SPECTER. Do you have that in the record, Mr. Chairman?

Senator **Hatch**. Without objection, we will put that in the record.

[Material referred to follows:]

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* ALSO ADMITTED TO
PRACTICE IN KENTUCKY

September 22, 1983

Direct Dial: 579-6421

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
U. S. Senate
Washington, D. C. 20510

Dear Mr. Chairman:

The undersigned supports the appointment of Sherman Unger to the U. S. Court of Appeals for the Federal Circuit. By this letter and the attached Affidavit, I wish to make note of my support to the Committee on the Judiciary and trust that due note of the support and the contents of the Affidavit can be made known at the time of the hearing by the Committee on Mr. Unger's appointment.

Yours very truly,

John L. Muething

JOHN L. MUETHING

pl

AFFIDAVIT

STATE OF OHIO)
(SS:
COUNTY OF HAMILTON)

JOHN L. MUETHING, being first duly cautioned and sworn, deposes and says:

(1) I am a partner in the law firm of Keating, Muething & Klekamp and have been so since 1955. Our firm has been and is counsel to American Financial Corporation in various legal matters including litigation.

(2) Gary P. Kreider has been associated with Keating, Muething & Klekamp since 1964, and has been a partner in this firm since 1973. Mr. Kreider has been involved in the representation of American Financial Corporation from time to time.

(3) I am familiar with the Affidavit executed by Mr. Kreider on May 24, 1978 which referred to certain events which allegedly occurred in August, 1972 involving Mr. Kreider and Sherman Unger.

(4) I am further aware that Mr. Kreider's Affidavit of May 24, 1978 was signed solely in connection with a highly contested complex litigation involving American Financial Corporation in which Mr. Unger had a part. As counsel for American Financial Corporation, I caused this Affidavit to be filed in the pending litigation.

(5) During the time since 1972 that Mr. Unger has practiced law in Cincinnati, Ohio, I have had on many occasions the opportunity to observe Mr. Unger and be aware of his legal work product, and have also acted as counsel in various litigated matters in which Mr. Unger served as lead counsel for the opposition. By reason of this knowledge and observation and notwithstanding my having caused the Affidavit previously mentioned to be filed, it is my opinion that Mr. Unger possesses the legal ability, the integrity, the personal temperament and judicial qualifications which qualify him for service to the Federal Bench.

Further affiant sayeth naught.

John L. Muething

John L. Muething

Sworn to and subscribed before me this 22nd day of September, 1983.

James E. Burke

Notary Public

JAMES E. BURKE, Attorney at Law
Notary Public, State of Ohio
My commission has no expiration date
Section 147.03 O. R. C.

MEMO TO FILE RE: SHERMAN UNGER

On September 27, 1983, at 9:05 a.m., conferred via telephone with John L. Muething (513-579-6421) regarding his letter and affidavit of September 22, 1983, in which he lends his support to Sherman Unger.

I asked Mr. Muething if the affidavits of Gary P. Kreider and Charles Berghaussen which he caused to be filed in pending litigation in 1978 (referring to certain events which allegedly occurred in August 1972) were truthful and accurate. Mr. Muething stated that they were truthful and accurate. He explained that the event described in the affidavits occurred about eleven years ago and notwithstanding this, he feels that based upon his knowledge of Mr. Unger's abilities, Mr. Unger is qualified to be a Federal Judge.

Joseph Kopka
Joseph Kopka
Investigator
Committee on the Judiciary
U.S. Senate

Senator **Hatch**. I wish to address the next issue. Mr. Coleman and his committee allege that you signed a false affidavit in a bankruptcy case relating to your relationship with a party that you were representing at the time. We heard the testimony of Mr. Aug yesterday. How would you respond to that?

Mr. **Unger**. I thought Mr. Aug's testimony laid it out very well. That was my first bankruptcy proceeding. I retained Mr. Aug as cocounsel because I understood that bankruptcy was a different world than either the court of common pleas, which is the trial level in Ohio, or the district court. And one thing I did not want to do was to get caught up in a maze that I was unfamiliar with. I primarily was there as trial counsel. Mr. Aug was primarily there as bankruptcy counsel. He prepared those affidavits, and I did sign them.

I think what happened is that the affidavit itself went further than was required by the bankruptcy rules or procedure. As I understand it and have looked back on it, I have to have no interest that was adverse to the debtor. Generally, a debtor in possession always brings his counsel in. Having represented the debtor in possession is not—prior to going into proceeding is not an adverse interest.

Senator **Hatch**. So, basically, you associate yourself with the comments made by Mr. Aug, who is, the dean of the bankruptcy bar in the area.

Mr. **Unger**. He is, sir. He teaches bankruptcy at the University of Cincinnati College of Law. He is highly respected as a bankruptcy expert.

Senator **Hatch**. So, you rely on his testimony on that score?

Mr. UNGER. There was no intention to mislead. My coinvestments, if you will, with Unit were made public. The judge knew about them. All of this was not done the day I signed this affidavit, but I did not read the affidavit——

Senator HATCH. Was this a matter of circumstance where you signed whatever he asked you to sign? You were relying on Mr. Aug and did not really look at the affidavit yourself?

Mr. UNGER. Unfortunately, that is accurate.

Senator HATCH. OK.

The ABA Committee alleges that there may have been a genuinely adverse relationship between you and your client and that, in any event, this was a determination for the court to make on the basis of all the necessary information. How could you respond to that?

Mr. UNGER. There was no adverse relationship between me and my client. If we had a mutual investment, we both wanted the partnership to survive.

Senator HATCH. All right. Mr. Coleman indicated that there may have been an adverse relationship between you and the creditors here. How would you respond to that?

Mr. UNGER. Well, to a certain extent, Senator, any time you represent a debtor in possession, you may have an adverse position to a creditor. That would not be unusual, because you are trying to bring the debtor in possession out of bankruptcy. The creditor wants to get a hundred cents on the dollar. That is a possibility. That is always a possibility.

Senator HATCH. I see.

Mr. UNGER. But that does not change my representation nor does it give me an adverse relationship to the debtor in possession.

Senator HATCH. The ABA Committee alleges that there was a relationship between Unit Park and Scioto Corp. that necessitated you being more forthcoming on the false, signed affidavit.

How would you respond to that?

Mr. UNGER. It was put into—early, it was put into the statement of affairs that I was a limited partner. Early on, it was discussed in court. Mr. Rosenberg raised it in court. We had 5 days' hearings on this. This particular affidavit was one of the affidavits that was examined by Judge Gilday, who testified yesterday in great detail. The court did not feel that I had misled anybody or I had intended to mislead anybody.

Senator METZENBAUM. Mr. Chairman, may I interrupt?

Senator HATCH. Yes, Senator.

Senator METZENBAUM. I cannot stay, but I want to indicate to you in the softest tones I know possible, in view of the sense of outrage that I feel, this is an illegal hearing. This committee can only meet upon due notice. If I am not mistaken, Mr. Short can advise us as to this. I think it requires 2 days' notice.

I walked over to the Capitol Building with you after the hearing yesterday. You gave no indication that there would be a continuation of the hearing this morning. My staff spoke with your staff yesterday at the conclusion of the hearing. They advised somebody, in response to a question, that in no way would there be a hearing today. At 8:30 this——

Senator HATCH. I announced it before I walked over there. I think your staff was here when I announced it last evening. And we did not set a new date for a hearing. We recessed from yesterday until today. If we do not conclude today, I am going to have to recess until the next day I can do it.

Senator METZENBAUM. Mr. Chairman, I have to tell you that——

Senator HATCH. This is a continuation of the original hearing.

Senator METZENBAUM [continuing]. At 8:30 this morning was the first time I knew that there was a hearing. At that point, I was at home.

Senator HATCH. I cannot solve that. I cannot call every member of the committee. It is up to staff to do that.

Senator METZENBAUM. You may say that you cannot do it, but, Mr. Chairman, you are responsible for the staff's responsibiiities, and not I.

Senator HATCH. I will take responsibility. But all I can say, is that everybody who was here knew there was a hearing today. If your staff members were here, they knew there was a hearing. If they were not here, they should have been, if you have an interest in this. My staff was here. I stayed here until 7:30 last night.

Senator METZENBAUM. I know full well you stayed——

Senator HATCH. And I do not think it is fair to Mr. Unger. If you read the Washington Post this morning, there was all kinds of unfavorable testimony to him; they only told one side.

Senator METZENBAUM. Well, Mr. Chairman, I——

Senator HATCH. The best thing to do is to recess, and that is a continuation of a hearing. And this is the first time I have ever heard anybody say that a hearing cannot be continued. I do it on the Labor committee all the time in the interest of expediting our work.

Now, I apologize to you that staff did not contact you. I assume staff would contact every member of this committee so they could be here.

Senator METZENBAUM. As you well know, Mr. Chairman——

Senator HATCH. I awoke at 6 o'clock this morning, and I did not have any time to call anybody.

Senator METZENBAUM. As you well know, Mr. Chairman, the Senate was in session continuously, and some of us were on the floor in connection with matters on the floor of the Senate until the conclusion of that body's activities.

Senator HATCH. Well, I left here about 7:30 Howard, and I do not know where the Senate was at that time——

Senator METZENBAUM. Now, the facts are——

Senator HATCH [continuing]. I just knew there were not any more votes.

Senator METZENBAUM [continuing]. Mr. Unger has a concern about these hearings but so do the people who will have to appear before him if and when he is confirmed. I would say to you, Mr. Chairman, that I have a host of questions for Mr. Unger, but I am due on the floor at 10 o'clock. Therefore, I am unable to remain. I would not have scheduled, permitted that schedule conflict to occur, or I would have taken it up with you earlier. But under the circumstances I must say to you that I insist that there be another hearing in connection with this.

Senator HATCH. I suspect there will be, because we have to finish here by 10 o'clock. We are probably going to have to continue to Monday.

Senator METZENBAUM. What time on Monday, so I may guide my staff?

Senator HATCH. I would think that we would have to start about 10 o'clock. Would that be convenient to you, Mr. Unger?

Mr. UNGER. Yes, sir.

Senator HATCH. We will have to check the chairman's schedule, but tentatively it would be at 10 o'clock.

Senator METZENBAUM. Mr. Chairman, that would not be convenient for me. Can you make it at 2 o'clock?

Senator HATCH. I cannot make it at 2 o'clock. I am going to have to make it convenient to the Chair, and I am going to continue the hearing. We will have to check with Senator Thurmond as well.

But, let me say this to you. I apologize that staff did not call—if they did not call every member of the committee, I apologize. But I personally have never done that. However, at 7:30 last evening we accommodated all of the pro and con witnesses. I said I was going to do that. Then I said we would probably have to continue this over. And I think I made myself pretty clear. I did not announce the time because I did not know either. We decided to try and get it early enough so we could, hopefully, complete this before 10 o'clock. We cannot.

I personally feel that it is unfair to Mr. Unger for this committee to allow Mr. Coleman's allegations to remain unanswered for any significant period of time. I think the committee owes it to any nominee here, to allow him to respond to allegations as quickly and expeditiously as we can. I do not enjoy being here this morning, but I am going to try and give this man his day.

Now, everybody who was interested in this hearing, to my knowledge, had staff here.

All I can say to you is that I apologize that this misunderstanding has occurred.

Senator METZENBAUM. I must confess to you, Mr. Chairman, that, when you and I and Senator Specter were walking over to the floor, I thought the hearings had been concluded for the evening.

Senator HATCH. They were not.

Senator METZENBAUM. You did not say so——

Senator HATCH. I said that I was going to come back, and I was going to try and accommodate these people who had to catch their plane last evening. If you missed it, I am sorry.

Senator METZENBAUM. I did miss it. I could have easily been here.

Senator HATCH. Well, I apologize.

Senator METZENBAUM. I had no problem in getting back after the session was over, because the session adjourned at 6:30.

Senator HATCH. I can understand why you feel badly, Senator Metzenbaum, but, frankly, I am not doing this for fun. I am trying to be fair to Mr. Coleman and Mr. Unger. I want to resolve it.

Senator METZENBAUM. I would have been here, Mr. Chairman. I would have been here.

Senator HATCH. Well——

Senator METZENBAUM. If I had known you were carrying on, I would have been here.

Senator HATCH. I think there is some responsibility on your part, too, knowing that I was trying to expedite this hearing and after 6 hours trying to get it concluded, for you to check and see. But I apologize. I think staff should have contacted every Senator on this committee, and certainly Senator Specter and you. Senator Specter was here, so, of course, he knew I was going to continue this at 8:30 this morning.

Senator METZENBAUM. I would have been here at 8:30 had I known there was a hearing at 8:30. I would have had no problem——

Senator HATCH. To that extent your criticism is just. However, I do not think your criticism is just with regard to the continuation of the hearing. I have a right to continue it. So, I continued it at the next earliest time. It is an inconvenience to Mr. Coleman, but he is here. He had another schedule this morning. He understands I am trying to resolve this matter one way or the other.

Senator METZENBAUM. Mr. Chairman, can I be assured that I will be notified by you, in this instance, as to what time you are going forward on Monday or Tuesday or Wednesday?

Senator HATCH. I will notify you right now that I intend to go forward at 10 o'clock unless Senator Thurmond feels it has to be at another time. The reason I intend to go ahead at 10 o'clock is to accommodate Mr. Unger at the earliest possible convenience, and to, accommodate others.

I know, Mr. Coleman, you want to be here. Is that an inconvenient time for you? I am concerned more about the two of you than I am about anybody else in this matter.

Mr. COLEMAN. As you know, I am here representing the ABA. Everything I say is the ABA. This is not Coleman versus Unger. This is an attempt by the ABA to do its job.

Senator HATCH. Can you be here Monday at 10?

Mr. COLEMAN. I feel that, unless a judge orders me to be in another court at 10 o'clock, you have priority on my time.

Senator HATCH. You will try to be here.

Mr. COLEMAN. Yes.

Senator HATCH. It is not crucial for you to be here. Your remarks are on record. I have said I will keep the record open so that you can acquire a transcript and, of course, answer anything you disagree with.

Mr. COLEMAN. Oh, I thought you said that, once Mr. Unger got finished, I could rebut things he said.

Senator HATCH. I did not say that. I said I would keep the record open.

Mr. COLEMAN. I wish you would recheck the record. That is why I came back. I have been making notes——

Senator HATCH. To my recollection, I did not say that.

Mr. COLEMAN. I have not had an opportunity to reply to the statements and tell Senator Specter, for example, the reason——

Senator HATCH. Well, then he will want an opportunity to reply to you.

Mr. COLEMAN [continuing]. Why the affidavits were not blackmail. If you read the judge's statement in the *Donohoo* case, it dealt with the issue under rule 23 and——

Senator Hatch. You can put that in writing, and we will read it.

Mr. Coleman [continuing]. That is the reason why they were filed, because rule 23 says a person cannot be counsel for a derivative shareholder unless he does not have a conflict which the judge would feel would make it impossible. And that is the reason——

Senator Specter. Mr. Coleman, I think it is fine to file those affidavits in that context on that issue.

Senator Hatch. Sure.

Senator Specter. I do not think it is appropriate to threaten to file them. That is the distinction that I see. I am interested in your views on it——

Senator Hatch. I am, too.

Mr. Coleman. That is why I wanted——

Senator Specter. I do not have to tell you what respect I have for your views and what respect the committee has for your views. This is an issue that I have dealt with in the past, as to something that is proper to do but not to threaten to do.

Mr. Coleman. I realize that. But I thought I had an opportunity to tell you why it was done and the circumstances and the fact the judge in the *Donohoo* court in his recital of facts indicated why he thought perhaps it was relevant.

Senator Hatch. We have heard your testimony on that already, Mr. Coleman, but we will give you that opportunity in writing.

You had almost 3 hours yesterday, between your testimony and the question-and-answer period. Mr. Unger has had about a half hour.

Mr. Coleman. Sir, the issue here is the gentleman who wants to go on the Federal court of appeals for life and would have the responsibility of deciding controversies which are the most important in the world between two people. To say that the public has less than 3 or 4 hours to indicate why, in their judgment, the person is unfit, I really think, is not a proper proportion of the time.

Senator Hatch. That is not what I am saying. We represent the public, and we are going to give consideration to everyone. If there is something that remains unrebutted, we are keeping the record open so you can rebut it. I think that is fair. We will try to alot Senator Metzenbaum time for his questions but I think we ought to accommodate him next Monday at 10 o'clock so that we can conclude this hearing, unless Senator Thurmond says otherwise.

Senator Specter. Mr. Chairman, when you say Monday at 10, I have other commitments on Monday at 10.

Senator Hatch. You would like to be there.

Senator Specter. Monday is a day when there are duties in the home State. We are not in session.

Senator Hatch. We could meet earlier in the morning.

Senator Specter. I do not propose to be here earlier in the morning. I am prepared to come at any time, as you know, Mr. Chairman, at 8:30 this morning.

I have been contacted by both sides in this matter and have made a commitment to sit through the testimony and to listen to it all. It is an onerous job. You have taken on quite a responsibility. It is hard to find members of this committee to sit and listen. I think it is important to do. I have had commitments on October 3 for a long time, for a month. But I can be here by 1 o'clock. I will cut short my activities and be here by 1.

Senator HATCH. Let me speak with Senator Thurmond. That may fit his schedule better. It seems to fit Senator Metzenbaum's better. I will check.

Senator METZENBAUM. Maybe on Tuesday——

Senator HATCH. I cannot. Tuesday, Wednesday, and Thursday are all of our toughest days, as you know. I have committee hearings and other commitments. Let us see. We will try to resolve this.

Senator METZENBAUM. Mr. Chairman, I am going to have to leave.

Senator HATCH. Everybody is.

Senator METZENBAUM. I am concerned about this income tax matter.

Do I understand that earlier this morning Mr. Unger responded that he failed to indicate that he received $40,000 as a fee because he overlooked the matter in his checkbook?

Senator HATCH. That is correct.

Mr. UNGER. That is correct, yes, sir.

Senator HATCH. That is correct, he also explained the problem.

Mr. UNGER. I also indicated that as soon as it was pointed out in the audit, I had my return amended, and I paid it.

Senator SPECTER. Senator Metzenbaum, that question was pursued. I have asked that his return be made available to us. We have some more questions pending on it.

Senator METZENBAUM. I certainly have a lot of questions because most taxpayers that I know do not overlook $40,000 of income.

You did not correct your return, as I understand it, until the matter actually came up by the IRS, which picked it up when it was checking the returns of some other corporate taxpayers.

Is that correct? You did not do it voluntarily. It was only after it had been pointed out to you.

Mr. UNGER. Yes, sir. If I had known about it, if I had remembered it, I would have done it. As soon as it was pointed out, I paid it.

Senator METZENBAUM. Let me ask you, Mr. Unger. Do you think the average taxpayer in this country would be accorded the same kind of treatment that, if he overlooked reporting $40,000 of income, that he would be able to just go back and say, oh, I forgot, that was an oversight on my part, and go back and file an amended return?

Mr. UNGER. Senator, I am average taxpayer. I pay a lot of taxes. I was an average taxpayer in 1968. It was under an audit.

They asked me about it. I looked at it. I said I agree with you, it was a taxable event; I will pay it.

Senator METZENBAUM. As a matter of fact, the matter of the IRS investigating this matter was not treated as an ordinary taxpayer. They state: Because of the complexities of the issues, along with the designation of "sensitive" to the case, a short recitation of the indirect facts and issues but germane to the fact is deemed appropriate.

I would assume that sensitive had something to do with the fact that you were a pending nominee of the President of the United States.

Mr. UNGER. The Senator has information I have never seen. I have no reason to disagree with what you are reading.

Senator **Hatch.** I have checked into this, Senator Metzenbaum. As I understand it, a representative of the minority was here last evening. As I understand the way the committee operates, the majority notifies the majority, and the minority notifies the minority. But maybe we ought to have a rule where the majority takes the responsibility of notifying everybody.

Senator **Metzenbaum.** He was here. Let him respond.

Senator **Hatch.** I was talking about Senator Biden's representative.

Mr. **Meyers.** I was here until approximately 10 after 7. Mr. Aug was finishing his testimony.

Senator **Hatch.** You knew I would not get to him.

Mr. **Meyers.** Mr. Unger's associate may remember that he and I and Tom Parry from your staff stood at the door. Mr. Unger's associate suggested about the hearing being continued to today. Mr. Parry said, oh, there is no way it would be held today, because of Civil Rights Commission, et cetera. I talked to Mr. Short earlier, relied on that. My——

Senator **Hatch.** Well, that is incorrect, because Mr. Parry had not checked with me. Mr. Dent was here, though, with Mr. Biden's staff.

All I can say is that I apologize for that, but I do not think it is all our fault. I was here doing the job. I think it is our right, when we chair these hearings, to continue them if they are not finished, and continue them to the time that is convenient to the chair. I feel badly that you were not notified. You will have plenty of time to chat with Mr. Unger. Hopefully, we can do it next Monday.

Senator **Metzenbaum.** You will let us know?

Senator **Hatch.** The staff is going to. If you ask me, I will let you know.

Senator **Metzenbaum.** Of course.

Senator **Hatch.** Mr. Unger, let me just finish that one last question because it does end the third allegation by the ABA.

The ABA Committee alleged that there was a relationship between Scioto Corp. and Unit Park and that this necessitated that you be more forthcoming on the affidavit. How do you respond to that? Was there a relationship between Unit Park and Scioto that really made this a difficult problem?

Mr. **Unger.** No, sir. Unit was the general partner of Scioto. Unit in chapter 11 was a real estate developer. Scioto in Chapter 12 was one of its developments. Their interests——

Senator **Hatch.** Was this a general partner-limited partnership relationship?

Mr. **Unger.** Their interests were the same. Unit, chapter 11 debtor in possession, was the general partner of Scioto, chapter 12 debtor in possession.

Senator **Hatch.** OK. So, in retrospect, had you received the affidavit and not just relied on Mr. Aug in this matter, you probably would have changed the affidavit. But even though the affidavit was not totally correct, it did not make any difference.

Mr. **Unger.** That is correct. And all of this was made public in the——

Senator **Hatch.** Everybody knew all of the facts.

Mr. **Unger.** Yes, sir.

Senator HATCH. So, you are saying it is a de minimis allegation.

Mr. UNGER. Yes, sir.

Senator HATCH. We have got about 5 more minutes. We ought to settle this if we can. Senator Metzenbaum has questions. We are going to have to open all three allegations up again.

Senator SPECTER. Mr. Unger, did you read this affidavit before you signed it?

Mr. UNGER. I probably did, and I probably did not understand the import of it. I think Mr. Aug gave me a series of papers to sign all at the same time. You will notice they were not all filed at the same time, for whatever reason.

Senator SPECTER. You say that you probably did?

Mr. UNGER. I would think, as a matter of habit, I would have read it, yes, sir.

Senator SPECTER. As a matter of what?

Mr. UNGER. Of habit, that I would have read it.

Nothing jumped out at me. He said these are the proper bankruptcy papers to be filed.

Senator SPECTER. As a matter of habit or practice, what do you do in the usual course before you sign affidavits, if anything?

Mr. UNGER. I would generally read it. That is why I said, I have no individual specific recollection of having read it. I would think I would have read it.

Senator SPECTER. Well, I can understand that you would not necessarily have a specific recollection of one piece of paper. But what is your practice with respect to the care with which you read a document that you take an affidavit to?

Mr. UNGER. I read it.

And as I read that——

Senator SPECTER. All right. You read it, No. 1. But, No. 2, as a matter of practice, do you study the substantive content to make sure that it is precise and accurate?

Mr. UNGER. As a general practice, my answer is yes.

Senator SPECTER. An affidavit is as serious a document as can be structured within the law. There is nothing more that legal procedure can do to provide procedural assurance that there is a focus of attention and that the affiant knows what he is swearing to be true.

So, my question is, What is the level of care and consideration that you customarily give to an affidavit?

Mr. UNGER. Very precise. In this particular instance, I was really relying too much on Mr. Aug. I did not read relationship to mean any mutual investment. I suppose I should have.

Senator SPECTER. Well, in the statement submitted by Mr. Van Dusen, while he has said some derogatory things, he compliments you on your intelligence and your abilities. His exact words: I found him to be intelligent and energetic. And then he says ambitious. You are 2½ out of 3 on that.

But your point is that, as a matter of practice, you do carefully study affidavits that you sign?

Mr. UNGER. Yes, sir. That is my point. My point is——

Senator SPECTER. As a matter of practice, do you rely on anybody else, even somebody who may be the dean of some specialty, to give you advice as to what you sign?

Mr. UNGER. Senator, if I think I can get solid advice from anyone, I will listen to it.

Senator SPECTER. Well, I can understand that, Mr. Unger. And what is not challenged is your capability and your tenacity; we will probably come to that a little later, as it may have affected some of the comments which have been made. But one thing that comes through in very unequivocal terms is your care. It would be my expectation, from what I know of you and have seen in this record, that you would exercise great care before signing an affidavit.

You are nodding yes.

Mr. UNGER. I am in agreement. I try to.

Senator SPECTER. And it is not something that you would take lightly when somebody hands it to you, however experienced or however expert that person may be.

Mr. UNGER. That is a general observation with which I would agree.

Senator SPECTER. Because the position for which you have been nominated really requires that kind of care and attention and thoughtfulness and attention to detail.

Mr. UNGER. I understand.

Senator SPECTER. If and when you sit on the court of appeals, you are going to have to decide a lot of things that require a lot of meticulous attention.

Mr. UNGER. And I hope I have more time to study them than I probably had to study this affidavit.

Senator SPECTER. Well, how about that? Did you sign this particular affidavit in a hurry?

Mr. UNGER. I am sure that I did. I am sure that——

Senator SPECTER. Wait a minute——

Mr. UNGER. The point——

Senator SPECTER. Why do you say that? Do you have a specific recollection of what happened on the signing of these affidavits?

Mr. UNGER. I have a recollection Mr. Aug prepared all the papers, called me over to his office, and said these things need to be filed. I think where I went wrong in the affidavit is I misread the statement relationship and did not reflect it to mean a mutual investment. That did not jump out to me to mean that, because I was a limited partner in a partnership in which Unit Inc. also owned a portion of the partnership, that that was the kind of relationship that was being referred to here.

It starts out, unfortunately, by talking about I am not related, which comes out of personal bankruptcy.

Senator SPECTER. OK. Thank you very much.

Thank you, Mr. Chairman.

Senator HATCH. You are welcome.

Mr. Unger, the immediate problem is that I do not have my schedule. I do not know what Senator Thurmond wants to do. But I think we clearly have authority to continue this hearing until Monday at some time, or the most available time thereafter.

I wanted to start at 7 a.m. on Monday if it accommodates Senator Metzenbaum and Senator Specter. But Monday is a very difficult day because most Senators are coming back from their home States.

Senator SPECTER. Well, we are coming back, and we have commitments.

Senator HATCH. Yes, I understand.

Senator SPECTER. We have a lot of responsibilities, which everybody knows about, and we planned these.

Senator HATCH. I might not get back if the airlines are on strike. I am going out to Utah this weekend if I can.

The only thing I can do is meet with the chairman of the full committee and try to accommodate all of the Senators.

I intend to continue it on Monday, probably 1 or 2 o'clock. If we can start at that time, that would accommodate both of the Senators who have spoken here this morning. If not, then we will notify you as to the day of next week that we will continue.

We will recess and continue this hearing until further notice Monday, Tuesday, Wednesday, or whenever, next week. We will give you notice.

Mr. UNGER. I appreciate your concern.

Senator HATCH. We will try to get to you, Mr. Coleman, if you care to attend the rest of these. As I have said, we will keep this record open for all parties who want to submit anything in writing. We want you to have every opportunity. But, you know, I do not think it should be an adversarial relationship here.

With that, we will recess until further notice.

[Whereupon, at 10:04 a.m., the committee was recessed, to reconvene at the call of the Chair.]

NOMINATION OF SHERMAN E. UNGER

WEDNESDAY, OCTOBER 5, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 2:10 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (acting chairman of the committee) presiding.

Also present: Senators Specter and Metzenbaum.

Staff present: Duke Short, chief investigator and Joseph Kopka, investigator; Roy Meyers, Press Secretary; and Stephen P. Johnson, Counsel; Subcommittee on Juvenile Justice.

Senator SPECTER. The hearing will come to order. We have the continuation of the confirmation hearings on Mr. Sherman Unger.

Senator HATCH [presiding]. Ladies and gentlemen, this marks the third day of hearings on the proposed nomination of Sherman E. Unger to be U.S. Circuit Court Judge for the Federal Circuit.

Mr. Unger presently serves as the General Counsel for the Department of Commerce. This committee thus far has made an effort to hear from as many individuals as possible on this nomination. We have spent more than 2 hours listening to the criticisms of Mr. William Coleman, representing the American Bar Association or the survey and others have made, as well as the criticisms of Mr. Unger from two other members of the bar.

In support of the Unger nomination we have heard from former Attorney General Griffin Bell, former presidential advisers Lloyd Cutler and Edward McCabe, Secretary of Commerce Malcolm Baldrige, U.S. District Court Judge Norman Roettger, Administrative Law Judge Bernard Gilday, two members of the Ohio bar, former Senator Hugh Scott, and sitting Senators Robert Packwood and John Warner.

We have engaged in extensive questioning of both Mr. Coleman from the American Bar Association and Mr. Unger himself.

Before the day is out, we hope we can take testimony from two additional witnesses who have indicated their interest in testifying on this nomination over the past few days. However, we would like to continue with Mr. Unger until we get through these allegations and then after we finish with him, we will call these other two witnesses and then allow rebuttal.

It has also been indicated by Mr. Coleman that he would like to add testimony to this in open hearing. I have indicated that the record would be open and you could submit any writing you would like. I would like to extend to you, Mr. Coleman, the opportunity to do that if that is what you would prefer to do.

Mr. Coleman I will be at the pleasure of the chairman.

Senator Metzenbaum. It is my understanding, Mr. Chairman——

Senator Hatch. We want to give you that right, and I think all three of us feel the same way.

Senator Metzenbaum. Well, I am not quite sure we do. It is my understanding that you had indicated that if Mr. Coleman wanted to be heard further, that you would be willing to hear him.

Senator Hatch. That is what I just said.

Senator Metzenbaum. Oh, I thought you said that he could submit it in writing.

Senator Hatch. No. I said——

Senator Metzenbaum. I apologize.

Senator Hatch. I thought that last time, but I said that we were disposed to allow him to be heard further if he would like.

Senator Coleman. Mr. Chairman, you remember you called on Mr. Welsh. He has prepared testimony, and let me submit it to you now.

Senator Hatch. We will be happy to have him submit that.

Senator Coleman. You can receive it right now.

Senator Hatch. Sure. We will be happy to have that submitted to the committee, and we will enter it into the record at this point.[1]

Now, I would like to do is start again with Mr. Unger, get through the remaining part of these allegations, and then turn it over to the other Senators for questioning on any of these allegations. But I think we ought to get the answers to the allegations that have been made on record.

Now, Mr. Unger, Mr. Coleman and his committee allege that you signed a false affidavit in a bankruptcy case relating to your relationship with the party that you were representing at the time.

Now, you briefly responded to this. Would you care to add anything further to it?

TESTIMONY OF SHERMAN E. UNGER TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Senator Unger. So, sir. I think I responded that the word relationship in that affidavit could be read the way Mr. Coleman argues it. Though this was my first bankruptcy case, it was written by Mr. Aug. I read it. I did not interpret the word relationship to be a mutual investment, which is the argument that was presented.

Senator Hatch. Well, apparently Mr. Aug did not either in his testimony last week. But the ABA committee alleges that there may have been a genuinely adverse relationship between you and your client, and that in any event, this was a determination for the court to make on the basis of all the necessary information.

How would you respond to that?

Senator Unger. The court had all the necessary information. I think we had 4 or 5 days of hearings on it.

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[1] Statement of Paul P. Welsh can be found in part 1 on page 814.

Senator HATCH. I think you responded last time that you did not consider it adverse, and that everybody knew of the relationship and that nobody suffered any detriment as a result of the relationship.

Senator UNGER. That is correct, Mr. Chairman.

Senator HATCH. Mr. Coleman and his committee allege that you accepted fees for a bankruptcy proceeding prior to court approval. And of course this would be inappropriate in such proceedings.

As I recall your testimony, you indicated that prior to approval, court approval, that you had received something like $12,000, which was not approved by the court at the time. I do not know whether you indicated that it was a mistake on your part, or you just were not familiar with the bankruptcy rules.

I think you did indicate that it was an error, but it was later approved by the court. Am I correct in that?

Senator UNGER. Yes. What I said was that there were 4–6 separate monthly statements for nonchapter 12 services that is my first bankruptcy I submitted on a monthly basis, which were included in the debtor's possessions monthly report. The court approved the monthly report. It was a two page report that specifically showed I was getting these fees.

The monthly report was also made available to counsel for the other side and also made available to the principal creditor.

There were no questions raised about this during that 6-month period or any time thereafter.

Senator HATCH. The ABA contends that the relatively small amount of your unapproved fee is irrelevant to the fact of the wrongdoing in this case. Do you agree with that statement?

Mr. UNGER. It is technically in error. I did not know that I needed prior approval.

Senator HATCH. So you are saying that you were technically in error, but you did not realize and nobody suffered anything from it and it was approved by the court and known by the court afterward.

Mr. UNGER. Yes. And known by everybody involved.

Senator HATCH. Do you attribute that to your inexperience in bankruptcy cases, this being your first case?

Mr. UNGER. Yes, sir. That is one of the reasons I brought Mr. Aug in. Mr. Aug prepared the monthly statement at the time. We had no discussions that this was inappropriate.

Senator HATCH. OK. Now, the ABA contended that the initial $12,000 fee out of approximately $1 million in fees on this case was in fact never approved by the court even subsequent to the payment.

I believe your response to that was that it was approved by the court in a subsequent document, and that you considered it approved. The judge knew about it and nobody suffered any detriment as a result of it. You felt it was resolved by the subsequent approval in the approval of other documents in the case.

Mr. UNGER. Yes, sir. I think it was approved by the court when the court approved the monthly statement each month. It was on there and the court approved the statement. The court could see that I was paid a fee.

Senator HATCH. OK. Mr. Coleman and his committee allege that you have frequently been "intemperate and abusive" in court. Now, I would like you to respond to this.

Mr. UNGER. That is a little more difficult. Mr. Coleman does not cite any cases of or bring any witnesses, though I am sure he may have some. Until I hear the witnesses, I do not know what that really means.

Senator HATCH. We have been through all of these allegations before, but I am just reviewing a few of them. I think you have made a record on these allegations before. But are you aware of any specific allegations relating to your intemperateness and abuse in court?

Mr. UNGER. I have no specific allegations, and I would like to call the chairman's attention that over 30 years of litigation, there are times when you speak up. There are times when your opponent is arguing with you. There are times when you argue back; that two of my principal opponents within the ABA, one was censored, and one was a certificate to disbar him for conduct in a trial which he is referring to in the papers prepared by the ABA.

In one case, if I may go into that a minute, the judge censored the lawyer. The judge said that the lawyer's conduct was verging on civil obstruction of justice. The judge granted a very severe sanction.

It was Mr. Rosenberg who has submitted a statement. The judge's order in part said that Mr. Rosenberg and his cocounsel's conduct was "contemptible," "detestable," "unprofessional," "incredible," "an obstruction of justice."

And then the court continued that it "cannot condone and must censor" Mr. Rosenberg.

Now, I may have fought back during some of that, but those are the most severe words I have ever seen a judge hand down against any trial counsel.

Senator HATCH. And this is the man who has been criticizing you?

Mr. UNGER. Yes, sir. The other man that has been criticizing me, while we are on this point a moment, is Mr. Robert L. Keeler of the Cincinnati bar. He has an exhibit referring to a case that we tried.

In that case, which was Grace against Hargedine, a Federal district judge that heard that case filed a 30-page memorandum and a certificate concerning the conduct of Mr. Keeler. And in that the judge said that Robert L. Keeler had "so obstructed the proper administration of justice herein, as to block me in the performance of my judicial duties."

The court in that certificate concluded that there were "a multiple of apparently contemptuous acts which Mr. Keeler committed in connection with this trial."

So to say that I may not have fought back would not be true, but I have no specific instances of such conduct.

Senator HATCH. Mr. Unger, have there been occasions in court where you have had vociferous fights with other counsel, especially when there are high stakes involved and in an intense, difficult trial?

Mr. UNGER. Yes, sir.

Senator HATCH. Do you feel that that is unusual? Apparently, the ABA feels that that is unusual for trial counsel—they called it intemperateness and abusiveness. Do you feel you have been intemperate and abusive?

Mr. UNGER. No, I did not think so. I thought I was protecting the best interest of my client. There were strong counsel on both sides.

Senator HATCH. Do you recall any other instances, other than the times with Mr. Rosenberg, where somebody could accuse you of fighting too vociferously for your client and being abusive?

Mr. UNGER. I recall no other instances. Of course, I am not on the other side arguing the case, Mr. Chairman.

Senator HATCH. What you seem to be saying is that when trial counsel is in a high stakes counsel, that you can vociferously argue for your side and they can for theirs.

That is not totally unusual.

Mr. UNGER. I agree. I agree.

Senator HATCH. Mr. Coleman and his committee have alleged that you have directly contacted opposing parties in litigation in opposition to the desire of opposing counsel. Could you respond to that?

Mr. UNGER. I will respond to it as muich as has been made available. He names a lawyer that makes that statement. The only two cases I have had against that lawyer since 1969 that I can recognize were when he represented directors of American Financial Corp. I am sure I did not talk to them.

If there was a case prior to 1969 that I had with Mr. Stackler, nobody has identified it. I have no way of responding beyond that.

Senator HATCH. Are you aware of any other specific allegations on the part of the ABA relating to your dealings with opposing parties?

Mr. UNGER. Just those that were contained in Mr. Coleman's brief.

Senator HATCH. How would you respond to the ABA's suggestion that the specific complaints that they offered in their testimony really constitute a mere tip of the iceberg and that the ABA's need to protect the confidentiality of their sources precluded them from being more revealing to the extent of the opposition to your nomination?

Mr. UNGER. I find that a very difficult process for the person being investigated to respond to.

Senator HATCH. Do you feel that if they gave you the name and the instance that you would be able to answer any questions that would arise, or can you remember any time in your law practice where you dealt with parties represented by counsel in an unethical way?

Mr. UNGER. There was no intention ever to do that, and I don't think I ever did do that.

Senator HATCH. So, before you can respond further, you are going to have to have more specifics.

Mr. UNGER. Yes. If there are specifics, I will try to respond. I will go back through my records. Part of the problem that I have had over the last year is that a great many of these allegations have aged. They are more than 10, 12, 15 years old, and it is digging back into old and difficult records. I have tried to be as responsive and open as possible with what I had to work with, and I will continue to do that.

Senator HATCH. Maybe they can be more specific and you can rebut the specificity later. It seems to me you must, at least, be given examples and the names of the people making the accusations before you can respond to them.

Mr. UNGER. It would be very helpful.

Senator HATCH. You are saying you cannot remember any specific instances.

Mr. UNGER. That is correct.

Senator HATCH. Mr. Coleman and his committee allege that you engaged in unethical ex parte communications with a judge in a pending bankruptcy proceeding.

I would like you to respond to that. That is considered a serious accusation. I have to admit I think the other ones are serious if proven, but a number of them are technical at the very best.

But this is one that I think we must have you respond to in as much detail as you can.

Mr. UNGER. Mr. Coleman, after making some sweeping statements about ex parte contacts comes down to a conference that I had with judge Gartner in Cincinnati on or about July 14, 1977. At that time, as I am sure the committee knows, that was prior to the 1978 Bankruptcy Act. Bankruptcy judges served as administrators. Bankruptcy judges served as judges as well. They had just recently gotten the title judge and not referee.

The legislative history of that 1978 act specifically points out that one of the problems—and I will quote—"It is not uncommon for a bankruptcy judge to be unable to recall when called upon to resolve a dispute of facts after the trial"——

Senator METZENBAUM. I cannot hear you.

Mr. UNGER. I am sorry, Senator.

Senator HATCH. Get a little closer to the microphone if you can and read that again to us.

Mr. UNGER. Yes. I am quoting from the bankruptcy law revision reported in the Committee on the Judiciary, 95th Congress, first session, Report No. 95-595.

Is that more clear.

Senator METZENBAUM. That is before we changed the law.

Mr. UNGER. Yes.

Senator HATCH. This is about a year before we passed the Bankruptcy Reform Bill.

Mr. UNGER. Yes, sir, and subsequent to the time—this is 1977. The law was not changed until 1978.

Senator HATCH. So that is about a year before the law was changed.

Mr. UNGER. My conference was a year before the law was changed.

Senator HATCH. All right.

Mr. UNGER. What the committee report is saying, and I will quote:

> It is not uncommon for a bankruptcy judge to be unable to recall when called upon to resolve a dispute or find a fact after trial whether the information on which he is basing decisions was heard at the first meeting of creditors, during the judge's extensive ex parte contacts with the trustee and with counsel during the adminis-

tration of the case, or during the actual trial on the issue presented for the decisions.

During the period of time that I had my conference with Judge Gartner, he was administering the Chapter 11 that is in issue. To explain how I got there in the first place, I was of counsel in another bankruptcy matter in Wilmington, Del. There was a motion to appoint a trustee in Wilmington, Del. We lost that issue after some 5 days of hearings, and maybe the judge took it under consideration for almost a year.

Mr. Rosenberg, my opposing counsel in the Unit, Inc. matter in Cincinnati took it upon himself to deliver to Judge Gartner a copy of that opinion wherein my client lost and a trustee was appointed.

Judge Gartner read the order, presumably, had his secretary call me on July 14, 1977. Our office records do document that. We have affidavits that this was Judge Gartner's way of operating. We called me over an "administrative conference."

What it turned out was it wasn't as Mr. Rosenberg hoped, that he was going to look at the bad things that my client had been accused of and consider appointing a trustee. But he wanted to know what happened, what went on up here, why was a trustee appointed and what was happening to the money that we were going to lose.

To the best of my ability I responded to those questions. He was concerned about the estate he was administering. It was, in my mind, I was asked to come over. It was an administrative conference with Judge Gartner, which were common in the bankruptcy courts during that period of time.

I think Mr. Aug testified the same thing when he was here the other day. During the course of that conversation I said the only thing I could think of that could be done is to submit an application for reconsideration of an earlier order which he had to override.

Senator **METZENBAUM**. Mr. Unger, may I just ask you, didn't Judge Gartner testify under oath in Delaware that you had come in to see him and that he had not asked to see you? Am I incorrect in that assertion?

Mr. **UNGER**. If I may divide the question, Senator; Judge Gartner was not under oath. He did testify in Delaware.

Senator **METZENBAUM**. He did testify as I stated?

Mr. **UNGER**. He testified almost as you stated.

Senator **METZENBAUM**. Did I at least indicate the substance, that he in his testimony in Delaware——

Mr. **UNGER**. Sir?

Senator **METZENBAUM**. In his testimony, did he not come over and testify in that case?

Mr. **UNGER**. He was a named defendant.

Senator **METZENBAUM**. He was what?

Mr. **UNGER**. He was a named defendant.

Senator **METZENBAUM**. Named defendant. And he, at that point, did he not—do you have the record there?

Mr. **UNGER**. Yes, sir; I am looking for it.

Senator **METZENBAUM**. It would be good if you read it.

Mr. **UNGER**. I am looking for exactly the point. He says in effect that somebody——

Senator **Metzenbaum**. Who do not read——

Mr. **Unger** [continuing]. Judge Balick's order. I am reading to you. I will quote exactly. But again, as I said——

Mr. **Short**. Where are you quoting from, if you would, please?

Mr. **Unger**. At the bottom of page 10, a hearing held before Judge Stapleton, August 25, 1977.

Mr. **Short**. What exhibit would that be?

Mr. **Unger**. Sir?

Mr. **Short**. What exhibit?

Mr. **Unger**. Oh, exhibit 11.

Senator **Hatch**. Go ahead.

Mr. **Unger**. Are we ready?

Senator **Hatch**. Keep going, yes.

Mr. **Unger**. Quoting from the bottom of page 10—this is Judge Gartner's testimony. "But again, as I say, I thought nothing of it until a few days later. I do believe Mr. Unger either called or stopped in and said, 'Judge, we are having trouble in Wilmington.'"

If I may continue my answer, Senator, I would like to call your attention to the top of page 12 wherein Judge Gartner says:

> Somebody took—somebody gave him some documents that showed somebody took the fifth amendment sometime in the past. I got wind of that somehow. I don't know where, some attorney for one of the parties.
>
> And then I called Unger on the line again and grilled him on that. Get over here immediately. What is this about the fifth amendment? Well, I dug into that enough to satisfy myself.

Senator **Hatch**. As I understand it, your contention is that the judge invited you over and that this was not an unusual thing for Judge Gartner to do pre the 1978 bankruptcy reform bill.

Mr. **Unger**. That is correct. we have submitted affidavits from his secretary, other bankruptcy practitioners; the dean of the Cincinnati bar, Mr. Aug, was here to testify the same thing. We have an affidavit from the judge's secretary on that particular issue.

Senator **Hatch**. Let me put that in——

Senator **Metzenbaum**. Just a moment, so that we get that clear. You were not invited over, according to the judge's testimony. It says, "But again, as I say, I thought nothing of it until a few days later."

Now, first of all, he says:

> During the course of one of the hearings, counsel for, I think it was, Pittsburgh Bank, put on my desk a copy of Judge Balick's decision appointing a trustee in FREIDCO. I read it, didn't pay too much attention to it, but I thought, why is he giving me this? Why is counsel for creditor in Scioto Park giving me a copy of the decision in FREIDCO for my review?
>
> But again, as I say, I thought nothing of it until a few days later. I do believe Mr. Unger either called or stopped in and said, "Judge, we are having trouble in Wilmington." And I said, Wilmington? What is the matter?

And then he goes on. Now, that seems to indicate very clearly that you called him and he didn't call you. You just testified that he called you. Tell me where in that record it is indicated that he called you.

Mr. **Unger**. There is no place—well, I read where he called me again on the fifth amendment. That is an indication of that.

Senator **Metzenbaum**. What does the fifth amendment have to do with that?

Mr. UNGER. It is page 12 where Judge Gartner is saying, "I called him and said, you get over here," which is the way he did things.

Senator HATCH. Let us see if we can clarify it.

Senator METZENBAUM First you called him.

Mr. UNGER. No, sir.

Senator METZENBAUM. Where do you see that he called you?

Mr. UNGER. I have my telephone records that show on August 14 we received two calls from his secretary. I have an affidavit from——

Senator METZENBAUM. You have your telephone records from 1968?

Mr. UNGER. No, sir; this was 1977.

Senator METZENBAUM. 1977. You do not have your tax returns for previous years, do you, then?

Mr. UNGER. I have a lot of tax returns, Senator.

Senator HATCH. Well, let us get into that later. Let us get this buttoned down. I am going to get into that, but let us get through this testimony and let the man testify. We are going to have plenty of time for cross-examination.

Now, you stated you have an affidavit of Bonita Buerk, who is the secretary of Judge Gartner. I will take it.

Mr. UNGER. Yes, sir.

Senator HATCH. Now, we will put that in the record at this point where it says:

> I, Bonita Buerk, being first duly sworn, state as follows:
>
> One, I am a citizen of the United States and a resident of Florence, Ky.
>
> Two, for 21 years I served as a deputy clerk of the bankruptcy court and was secretary to the late Judge Leonard Gartner, U.S. Bankruptcy Judge for the Southern District of Ohio, Western Division.
>
> Three, it is my recollection that sometime in July 1977 after Judge Gartner read Judge Balick's opinion appointing a trustee for FREIDCO, Judge Gartner directed me to call Sherman Unger on the phone and get him over here.

Let us put that in the record at this point.

[Material referred to follows:]

AFFIDAVIT OF BONITA BUERK

STATE OF OHIO)
)SS:
COUNTY OF HAMILTON)

I, Bonita Buerk, being first duly sworn, state as follows:

1. I am a citizen of the United States and a resident of Florence, Kentucky.

2. For twenty-one years I served as a Deputy Clerk of the Bankruptcy Court and was secretary to the late Judge Leonard Gartner, United States Bankruptcy Judge for the Southern District of Ohio, Western Division.

3. It is my recollection that sometime in July, 1977 after Judge Gartner read Judge Balick's Opinion appointing a trustee for Freidco, Judge Gartner directed me to call Sherman Unger on the phone and "get him over here."

FURTHER AFFIANT SAYETH NAUGHT.

Bonita Buerk

SWORN to and SUBSCRIBED before me, a Notary Public, this 5th day of October, 1983.

Patricia A. Kindel
Notary Public

PATRICIA A. KINDEL, Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration date, Section 147.03 O.R.C.

Senator Hatch. Now, you mentioned a couple of other affidavits.

Mr. Unger. Yes, sir.

Senator Metzenbaum. Is that Bonita Buerk?

Senator Hatch. Bonita Buerk.

You mentioned a couple of others.

Mr. Unger. Yes. We previously submitted a general affidavit from Bonita Buerk on Judge Gartner's practices. We submitted an affidavit from a bankruptcy—from two other bankruptcy practitioners on judge——

Senator Hatch. Who are those, Mr. Gehring and Mr. Schletsky, is that their names?

Mr. Unger. Yes, sir.

Senator Hatch. And what do they say in their affidavits?

Mr. Unger. That it was Judge Gartner's practice to call attorneys or trustees in whenever there was anything that concerned him on administrative or procedural matters.

Senator Hatch. Including ex parte——

Senator Metzenbaum. Mr. Chairman, we do not have a copy of that affidavit. We have here——

Senator Hatch. From Bonita Buerk?

Senator Metzenbaum. From Bonita Buerk, but it does not read as——

Senator Hatch. We are making copies for you, Senator. I read every word, except the "sworn to" part.

Senator Metzenbaum. Well, I have one here from Bonita Buerk that does not read as you read it. Now, there may be another one.

Senator Hatch. That is a separate affidavit. We will give you this other one as soon as we have a copy made.

Senator Metzenbaum. Can you tell me the circumstances under which that affidavit was obtained?

Mr. Unger. Yes, sir; I can. The more recent one?

Senator Hatch. The one from Bonita Buerk.

Mr. Unger. Yes; I called her this morning and asked her if she had any independent recollection. This has been a front page story in Cincinnati, I guess every day since I have been here. And I asked her if she had any independent recollection about the Freidco matter and who called whom. And she said that she did.

And I asked her if she would prepare an affidavit on that effect.

Senator Metzenbaum. Well, where is that affidavit?

Senator Hatch. That is what we just put in the record and we are getting you a copy of it.

Senator Metzenbaum. Just a minute. You called her this morning——

Mr. Unger. Yes, sir.

Senator Metzenbaum [continuing]. And did the affidavit already get into the record?

Senator Hatch. We have an affidavit here.

Senator Metzenbaum. Well, how did it get here from your telephone call to Cincinnati today? How did it get here by 2 o'clock?

Mr. Unger. It was prepared in Cincinnati, put on a telecopier and it came out on this end.

Senator Metzenbaum. We have one affidavit here from Bonita Buerk that does not read as you indicated.

Senator **Hatch**. We will put that affidavit in the record at this point.

[Material referred to follows:]

AFFIDAVIT OF BONITA BUERK

STATE OF OHIO)
) SS.
COUNTY OF HAMILTON)

Bonita Buerk, being first duly sworn, states as follows:

1. I am a citizen of the United States and a resident of Florence, Kentucky.

2. For 21 years, I served as a Deputy Clerk of the Bankruptcy Court and as secretary to the late Judge Leonard Gartner, United States Bankruptcy Judge for the Southern District of Ohio.

3. During my service with Judge Gartner, I became familiar with the way Judge Gartner conducted his court and handled matters that were pending before him.

4. It was Judge Gartner's practice to summon an attorney or trustee to his chambers in order to discuss with that individual any situation or problem which the Judge felt needed explanation or clarification.

5. On occasion, Judge Gartner would telephone an attorney and hold such discussions by telephone.

6. The subject matter of these conferences varied but were normally precipitated by the filing of a report of a trustee, debtor-in-possession or attorney and dealt with some aspect of the administration of the debtor's or bankrupt's estate including, on occasion, a procedural problem arising from a contested or adversary proceeding.

7. It is my recollection that Judge Gartner would routinely meet with attorneys and trustees on any matters he felt would aid the efficient administration of bankruptcy estates and many attorneys and trustees practicing before Judge Gartner engaged in such conferences over the years.

FURTHER AFFIANT SAYETH NAUGHT.

Bonita Buerk
Bonita Buerk

SWORN to and SUBSCRIBED before me this 15th day of January, 1983.

Notary Public

Senator METZENBAUM. Who prepared that affidavit for her, Mr. Unger?

Mr. UNGER. I believe a Patricia Kendall from my former office.

Mr. SHORT. What exhibit is that, Mr. Unger?

Mr. UNGER. What exhibit is that in the exhibits exhibited by the ABA?

It is not in the ABA. It was just drafted this—signed this morning.

Senator HATCH. Are you talking about the prior——

Senator SPECTER. It is 16.

Senator HATCH. The first affidavit by Bonita Buerk.

Senator SPECTER. It is No. 16.

Senator HATCH. This is the first affidavit. Let us just put it in the record at this point where she says again she is a citizen of the United States and a resident of Florence, Ky.

Then she goes on again to say that she served as deputy clerk. And No. 3:

> During my service with Judge Gartner, I became familiar with the way Judge Gartner conducted his court and handled matters that were pending before him.
>
> Four, it was Judge Gartner's practice to summon an attorney or trustee to his chambers in order to discuss with that individual any situation or problem which the judge felt needed explanation or clarification.

You are saying that was his practice.

Mr. UNGER. Yes, sir, I am.

Senator HATCH. Before the Bankruptcy Reform Act of 1978, that this was common in bankruptcy courts, and that is what Mr. Aug testified to.

Mr. UNGER. Yes, sir.

Senator HATCH. It says:

> No. 5, on occasion Judge Gartner would telephone an attorney and hold such discussions by telephone.
>
> No. 6, the subject matter of these conferences varied, but were normally precipitated by the filing of a report of a trustee, debtor in possession, or attorney, and dealt with some aspect of the administration of the debtor's or bankrupt's estate, including, on occasion, a procedural problem arising from a contested or adversary proceeding.
>
> No. 7, it is my recollection that Judge Gartner would routinely meet with attorneys and trustees on any matters he felt would aid the efficient administration of bankruptcy estates, and many attorneys and trustees practicing before Judge Gartner engaged in such conferences over the years.

This is January 15, 1983. The other one is October 5, 1983.

Mr. UNGER. Yes, sir.

Senator METZENBAUM. Well, Mr. Chairman, are you trying to rebut the testimony of a Federal judge when he said unequivocally that Mr. Unger initiated the meeting? He goes on to say—we skipped some of the things he said.

Senator HATCH. I think that these affidavits play a very important role. Mr. Unger says that he was called. The secretary said that was a pattern of practice of the judge. We all know that before the——

Senator METZENBAUM. Just a moment.

Senator HATCH. Let me answer—before the Bankruptcy Reform Act of 1978, that there were—that the judges did handle these this way in bankruptcy, even though in other courts it is not handled that way.

So, I suppose that the affidavits speak for themselves, but I think that it is clear that you have him testifying here. Judge Gartner is dead, and Judge Gartner's secretary backs him up.

Senator METZENBAUM. Now, Mr. Unger was very willing to read page 10 and page 11. But look on page 12. But let us go to page 11.

Senator HATCH. Sure.

Senator METZENBAUM. Reading from Judge Gartner's testimony, "Incidentally, I read some documents and you"—he is now speaking to the court:

> Keeping referring to my order as an ex parte order, which it was, of course, but believe me, it was not issued just by a person coming in and handing me a piece of paper and saying, would you sign this, judge. I grilled Mr. Unger for about an hour on the affairs of FREIDCO in Delaware trying to figure out and find out just where the problem lay because, as it was explained to me, I could not see the problem.
>
> The only thing we did not discuss, of course—and it came up, I notice, in some other documents—was somebody took the fifth amendment sometime in the past, and I got wind of that somehow. I do not know where, some attorney for one of the parties.
>
> And then I called Mr. Unger on the line again and grilled him on that, get over here immediately, what is this about the fifth amendment. Well, I dug into that enough to satisfy myself that it was not as serious as it purported to be.

The judge has testified, yes, it was, of course, an ex parte hearing, yet Mr. Unger did initiate it, and yes, the fact is I did call him, but he called him after Mr. Unger had initiated it.

Senator HATCH. Well, Mr. Unger, let us answer that, It seems to me that you have more than answered it with your own testimony and with the affidavits of Ms. Buerk, unless we want to give the judge the benefit of the doubt in this matter and ignore the affidavits and your testimony.

But in any event, it says: "I then called Mr. Unger on the line again." So he said: "I believe," and then he says he called you again. Now, what are we going to take? I mean, it seems to me the judge—either his recollection is not good or he is acknowledging he called you twice. Now, how do you answer that?

Mr. UNGER. That is correct. It was an ex parte conference, an administrative conference which was ex parte, which was the way the bankruptcy courts operated in those days. I think that we have to recognize that fact; it was in Judge Gartner's mind an administrative conference he had called.

Senator HATCH. What you are saying is if a judge called you and said get over here, you got over there. Do you know any other attorneys that would not get over there if the judge said get over there?

Mr. UNGER. In those days, before bankruptcy judges, no, sir.

Senator METZENBAUM. The judge says he got called from Unger and you keep coming back to, would you come over if the judge called you. Now, do you not pay any attention to what the judge said?

Senator HATCH. The judge said he called him again. You know, it seems to me that the judge's testimony is conflicting at best.

Mr. UNGER. First of all, may I make a statement here?

Senator HATCH. Yes.

Mr. UNGER. This is something that I would not have initiated before Judge Gartner. I was winning in Ohio and losing in Wilmington. There was damaging—there were damaging conclusions in the Wilmington judge's order. It would have been a high-risk situation to take that piece of paper where I had lost and a trustee appointed to try to get Judge Gartner to do anything because the high risk is Judge Gartner might appoint a trustee. That is why Mr. Rosenberg gave the papers to Judge Gartner.

Senator HATCH. Give me your best recommendation. Did Judge Gartner call you or did you call him?

Mr. UNGER. He had his secretary call me.

Senator HATCH. All right. And she told you to get over there.

Mr. UNGER. Yes.

Senator HATCH. And you got over there.

Mr. UNGER. Yes, sir.

Senator HATCH. Now, even if you had called him, are you saying at that time, as we have received other testimony, that that was the pattern and practice in bankruptcy court. That is one of the things we tried to clear up with the Bankruptcy Reform Act of 1978.

Mr. UNGER. That is correct.

Senator HATCH. But you are also saying that this was your first bankruptcy case.

Mr. UNGER. Yes; I was—I had been into it for awhile, and basically I had done trial work in the district court and the common pleas court. I tried to stay from ex parte contacts as a matter of habit.

Senator HATCH. That is right. How do you reconcile the apparent contradiction in Judge Gartner's testimony in Delaware. He said he believes that you initiated the call. Does that make any difference in this matter?

Mr. UNGER. It would be more clear if he said he had initiated the call. He says: "I do believe." He was not precise on who initiated the call.

My records made in 1977—plus I might suggest, Mr. Chairman, that 7 days later I appeared before Judge Stapleton in Wilmington, Del. We talked about this very same conference and contemporaneously—more nearly contemporaneously with the date I told Judge Stapleton that Judge Gartner called me again on an administrative conference. This was 7 days later.

Senator HATCH. Let me summarize. See if I am right. You correct me if I am wrong. You have a contemporaneous statement by you to the effect that the communication was initiated by Judge Gartner.

Mr. Unger. That is correct.

Senator Hatch. The affidavit by Bonita Buerk, Judge Gartner's secretary, to the effect that Judge Gartner requested that you come to his office, in fact, actually demanded that you come.

Mr. Unger. That is correct

Senator Hatch. The affidavits that you put into the record, I do not have copies of those, but let us get them and provide them to the Senators here today, affidavits by two other Cincinnati attorneys, Mr. Gehring and Mr. Schletsky, demonstrate that Judge Gartner had adopted the normal practice of meeting in an ex parte manner with attorneys involved in bankruptcy litigation.

Mr. Unger. That is correct.

Senator Hatch. You have the testimony of Mr. Aug, who also said that this practice was not unusual prior to 1978.

Mr. Unger. That is correct.

Senator Hatch. The only contradictory statement is a highly ambiguous series of statements by Judge Gartner who is on record as praising highly your ability, honesty, and integrity.

Mr. Unger. That is correct.

Senator Hatch. And it seems to me that we put into the last record, the House of Representatives report on the state of bankruptcy law prior to 1978, which stated explicitly that it was not an uncommon practice prior to that date for attorneys to meet in an ex parte manner with bankruptcy judges with regard to administrative or procedural issues. Are any of those things wrong?

Mr. Unger. No, sir.

Senator Hatch. Senator Specter and I have to go to a meeting with the majority leader. We both want to be here for any further questions on this matter. So we are going to recess for a few minutes until we can get back. We apologize, but we have no choice. We are 20 minutes late for that meeting now. But I felt it was important to at least get this far.

Senator Metzenbaum. Mr. Chairman, it is my understanding that there is a Delaware Supreme Court Judge who is present in the room who was cocounsel with Mr. Unger in the *Fredico* case, and that he is prepared to testify on the subject of ex parte meetings.

Senator Hatch. We will be happy to do that. Let us recess then until we can get back. We will return as soon as we can.

[Brief recess.]

Senator Hatch. Let us continue.

Mr. Coleman and his committee, Mr. Unger, allege that you engaged in an unethical attempt to substitute yourself as an attorney in pending litigation~~, and~~ we have had at least one other witness that I recall also backing up that assertion. Mr. Coleman was not a personal witness to this.

Could you respond to that? That is, the allegation that you engaged in an unethical attempt to substitute yourself as an attorney in pending litigation.

Mr. Unger. I remember the assertion. I do not remember the other witness, Mr. Chairman.

Senator Hatch. I thought it was Mr. Weich. Is that not basically what you said, Mr. Welch?

Mr. WELCH. That has nothing to do with me. That an entirely different case.

Senator HATCH. All right.

Do you recall the allegation?

Mr. UNGER. I recall the allegation. The situation in that case was that I had represented somebody by the name of Donohoo for a number of years. Donohoo was the named plaintiff in a class action that had been going forward against American Financial Corp.

Donohoo became very unhappy with his counsel in that case. There were an exchange of letters which—from Donohoo and his counsel back and forth concerning that representation. I would like to submit them for the record at that time. Donohoo and counsel agreed that they were not happy with each other, but counsel did not want to withdraw unless he was paid.

Senator HATCH. You are submitting it for the record, then?

Mr. UNGER. An exchange of letters from Richard G. Donohoo and Joseph Donohoo to Jacob Stein in Cincinnati. Stein was the class representative. Donohoo was the named plaintiff.

Donohoo also happened to be a client of mine and had been a client of mine for some number of years.

Senator HATCH. What are they being submitted for, again?

Mr. UNGER. In response to your question of why I made an application to substitute myself for counsel.

Senator HATCH. What do these documents show?

Mr. UNGER. They show that Mr. Donohoo—both Donohoos were unhappy with the representation that they were getting. They wanted to substitute counsel. Mr. Stein wanted to be paid before he would withdraw.

Senator HATCH. Without objection, we will put those documents in the record at this point.

[Material referred to follows:]

April 11, 1978

Jacob K. Stein, Esq.
Paxton & Seasongood
1700 Central Trust Tower
Cincinnati, Ohio 45202

Dear Mr. Stein:

I have this day requested John A. Lloyd, Jr. and Sherman E. Unger to enter appearances as additional counsel to represent me in the prosecution of *Donohoo et al v. American Financial Corporation*. As I expect they will be carrying a major role in the further prosecution of this action I request that you assist them and work with them so that we are prepared to aggressively litigate the matter.

Richard G. Donohoo

cc: John A. Lloyd, Jr., Esq.
Sherman E. Unger, Esq.

Piedmont Paper Products, Inc.
TELEPHONE 871-9969

p. o. box 8028
3522 erie avenue
cincinnati, ohio 45208

April 11, 1978

RECEIVED
APR 11 1978

Jacob K. Stein, Esq.
Paxton & Seasongood
1700 Central Trust Tower
Cincinnati, Ohio 45202

Dear Mr. Stein:

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Piedmont Paper Products, Inc.

Joseph G. Donohoo
Vice - President

cc: John Lloyd, Esq.
Sherman Unger, Esq.

RECEIVED
APR 15 1978

April 15, 1978

Mr. Sherman Unger,
2724 Dubois Tower,
Cincinnati, Ohio.
45202.

Dear Sherman:

Pursuant to our conversation, it was and is my intent that you and John Lloyd be lead counsel for me in the case against American Financial et al.

I am sending a copy of this letter to you to Mr. Jacob Stein, of Paxton and Seasongood, so that there will be no question about the way I want this case handled.

Yours very truly,

Richard G Donohoo
Richard G. Donohoo

RGD:me

cc Mr. Jacob K Stein, Esq.

Piedmont Paper Products, Inc.
TELEPHONE 761-9236
P. O. BOX 37901
CINCINNATI, OHIO 45222

April 15, 1978

RECEIVED
APR 15 1978

Mr. Sherman Unger,
2724 Dubois Tower,
Cincinnati, Ohio.
45202.

Dear Sherman:

Pursuant to our conversation, it was and is our intent that you and John Lloyd be lead counsel for us in our case against American Financial et al.

A copy of this letter to you is being sent to Mr. Stein, of Paxton and Seasongood, so that there will be no misunderstanding of the way we intend that this matter be pursued.

Yours very truly,

PIEDMONT PAPER PRODUCTS, INC.

Vice President

JGD:me
cc Mr. Jacob K. Stein, Esq.

RECEIVED
APR 1[illegible] 1978
[illegible]

352-6786

April 17, 1978

Mr. Joseph G. Donohoo
Vice President
Piedmont Paper Products, Inc.
P. O. Box 8028
3522 Erie Avenue
Cincinnati, Ohio 45208

Dear Mr. Donohoo:

Earlier today upon returning to my office from vacation, I saw for the first time your letter of April 11.

I have no desire to limit your selection of co-counsel and would be perfectly happy to cooperate as might be appropriate with Mr. Lloyd, with Mr. Unger, or with such other counsel as you might select. I should, however, point out to you that we accepted employment at your request in the American Financial litigation based upon the understanding that our services would be compensated on a contingent fee basis, with the Court determining the value of our services. We have for the past two years been working hand in hand with Wood, Lamping, Slutz & Reckman and we, of course, understood from the beginning that the fee as allowed by the Court would be shared between our two law firms.

I do not know what you have in mind with respect to the compensation of Mr. Unger and Mr. Lloyd. If your arrangements are to pay them out of your own pocket, then either the basis of that payment or its amount does not concern me. I do wish to give you notice at this time, however, that the association in this case of additional counsel is not likely to reduce my own workload or involvement and that I am not willing to subdivide our fee with other counsel. For your information, my firm has already expended over $60,000.00 in lawyer time on this matter and it is my understanding that Wood, Lamping has already expended something in the neighborhood of $40,000.00, making a total in excess of $100,000.00 of legal services rendered to date. It is impossible to predict the extent of further services which will be required, but if the case is not settled, it is a foregone conclusion that we have not yet reached the half way mark in terms of services rendered.

Please take notice, therefore, that as we have undertaken this employment at your request, we will expect compensation from you for any diminution of the contingent fee which may result from your employment of additional counsel.

I would be happy to meet with you to answer any questions which you may have in this regard, to explain further details concerning our position and to review with you both the work which we have done to date and the basis upon which we have computed the amount of legal services already rendered.

Yours very truly,

JKS /ews

Jacob K. Stein

JKS/cm

cc: Mr. John A. Lloyd, Jr.
Mr. Sherman E. Unger

RECEIVED
APR 19 1978

352-6786

April 17, 1978

Mr. Richard G. Donohoo
c/o Piedmont Paper Products, Inc.
P. O. Box 8028
3522 Erie Avenue
Cincinnati, Ohio 45208

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Yours very truly,

JKS/bws

Jacob K. Stein

JKS/cm

cc: Mr. John A. Lloyd, Jr.
Mr. Sherman E. Unger

Piedmont Paper Products, Inc.
TELEPHONE 871 - 9969

p. o. box 8028
3323 erie avenue
cincinnati, ohio 45208

April 20, 1978

Mr. John C. Osberger
Wood, Lamping, Slutz & Reckman
Tri State Building
Cincinnati, Ohio 45202

Dear John:

In light of the lack of cooperation received by John Lloyd and Sherman Unger since they have entered in appearance in the matter of Donohoo against American Financial, et al, and considering the attitude of Mr. Jacob Stein in his letter of April 17, 1978, we have concluded that we must request you and your firm to withdraw immediately from representing us in the above matter and that you take those steps necessary to accomplish this.

Would you, at your earliest opportunity, please turn over those papers that pertain to your representation of us in this matter to Messrs. Lloyd and Unger.

Yours very truly,

PIEDMONT PAPER PRODUCTS, INC.

Joseph G. Donohoo

Joseph G. Donohoo

JGD/ke

Piedmont Paper Products, Inc.
TELEPHONE 871- - 9969

P. O. BOX 8028
CINCINNATI, OHIO 45208

April 20, 1978

Mr. Jacob K. Stein
Paxton & Seasongood
1700 Central Trust Tower
Cincinnati, Ohio 45202

Dear Mr. Stein:

This will acknowledge receipt of your letter of April 17, 1978.

It would appear that you are laboring under a misunderstanding because at no time did we agree that you should undertake this matter on a contingent fee basis. At no time did we guarantee payment of your fee. We agreed to be responsible for out-of-pocket expenses only, but were to be kept currently advised of that amount with full authority to limit or terminate. We had no further agreement.

Additionally, we have been advised that you have refused to make available to John Lloyd or Sherman Unger papers pertaining to our case against American Financial. In light of the tone of your letter and after reflection upon your refusal to provide papers to Messrs Lloyd and Unger, we have concluded that we have no choice but to request that you immediately withdraw from representing Piedmont Paper Products in this matter and request that you take those steps necessary to accomplish this. Additionally, we request that you turn over the files that pertain to our representation to Mr. Lloyd and Mr. Unger at the earliest opportunity.

Yours very truly,

PIEDMONT PAPER PRODUCTS, INC.

Joseph G. Donohoo

Joseph G. Donohoo

JGD/ke

P. O. Box 8028
Cincinnati, Ohio 45208

April 20, 1978

RECEIVED
APR 20 1978

Mr. John C. Osberger
Wood, Lamping, Slutz & Reckman
Tri State Building
Cincinnati, Ohio 45202

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Yours very truly,

Richard G. Donohoo

Richard G. Donohoo

RGD/ke

P. O. Box 8028
Cincinnati, Ohio 45208

April 20, 1978

RECEIVED
APR 20 1978

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Paxton & Seasongood
1700 Central Trust Tower
Cincinnati, Ohio 45202

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Yours very truly,

Richard G Donohoo

Richard G. Donohoo

RGD/ke

PAXTON & SEASONGOOD
1700 CENTRAL TRUST TOWER
CINCINNATI, OHIO 45202
(513) 352-6700

WRITER'S DIRECT DIAL NUMBER

352-6786

April 25, 1978

RECEIVED
APR 26 1978

Mr. Joseph G. Donohoo
Piedmont Paper Products, Inc.
P. O. Box 8028
Cincinnati, Ohio 45208

Dear Mr. Donohoo:

I am sorry that you and I have still not had a face to face meeting which would have made it much easier for me to attempt to explain my conception of our relative positions in respect to the American Financial litigation. However, inasmuch as no such meeting has yet taken place or been arranged, I will attempt by this letter to reply to yours of April 20.

The role of a trial attorney in shareholder derivative litigation differs significantly from the role of a trial attorney in private litigation. The essential nature of this difference is that although the attorney is brought into the case by a particular shareholder or group of shareholders, once involved in the case he becomes attorney not for those who brought him into the matter, but rather becomes attorney for the subject corporation. Thus, in the American Financial litigation, I am now trial attorney for American Financial Corporation and its subsidiaries. As such, my fiduciary duties as attorney are to the corporation, rather than to the client or clients who brought me into this matter in the first place.

Further, the lawsuit initially brought for Donohoo and Piedmont Paper has now been combined into a so-called consolidated action, together with lawsuits initially commenced by a man named Helfend and a man named Lewis. By virtue of the consolidation, each lawsuit has lost its separate identity, and the three are now merged into one. There are six sets of lawyers involved in this consolidated action, and I am serving by the unanimous election of all counsel and by order of the Court as liaison counsel for all plaintiffs. This appointment places upon my shoulders certain additional responsibilities which I have been performing for most of the past two years.

Under these circumstances and considering further both the extent of my own knowledge concerning details of this litigation and the relatively advanced stage of the proceedings, I do not believe that it would be possible for me to withdraw from the case simply on the basis of your request that I do so. I have already explained to Mr. Lloyd that I feel obligated to persevere in my roles as trial and liaison counsel unless and until I am relieved of those responsibilities by order of the Court. I have further advised Mr. Lloyd that I am instructed by counsel representing the other plaintiffs that they consider the papers under my control to be their joint property, and that I am not to share them with Mr. Unger or with Mr. Lloyd until a proper application has been made to the Court, and until they have had an opportunity to voice their objections.

I should further point out that I am puzzled as to the meaning of the statements contained in the second paragraph of your letter to the effect that you did not understand our involvement in this case to be either on a contingent fee basis or pursuant to an agreement on your part to guarantee payment for them. I can only respond that I know of no other alternative. You must recognize that your employment of counsel can only have been on the basis that:

1. Counsel would prosecute the matter to a conclusion and be compensated, with the Court's approval, for benefit to the corporation; or

2. That as the party employing counsel, you would undertake to pay the reasonable value of the services rendered, regardless of the result.

Upon reconsideration, I think you will agree that the former is the alternative which you intended, and I would again caution that any action on your part which would frustrate our right to be compensated from the fund created, would give rise to an obligation on your part to make appropriate compensation out of your own pocket. I suggest that you meet with me for further discussions of this matter.

Yours very truly,

Jacob K. Stein

JKS/cm
cc: Mr. Sherman E. Unger

PAXTON & SEASONGOOD
1700 CENTRAL TRUST TOWER
CINCINNATI, OHIO 45202
(513) 352-6700
WRITER'S DIRECT DIAL NUMBER
352-6786

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APR 26 1978

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Cincinnati, Ohio 45208

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Yours very truly,

Jacob K. Stein

JKS/cm

cc: Mr. Sherman E. Unger

FILED MAY 4, 1978

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Richard G. Donohoo, et al.,
Plaintiffs,
v.
American Financial Corporation, et al.,
Defendants.

No. C-1-76-277

Robert Helfand, et al.,
Plaintiffs,
v.
Carl Lindner, et al.,
Defendants.

No. C-1-76-288

Harry Lewis,
Plaintiff,
v.
Carl Lindner, et al.,
Defendants.

No. C-1-76-291

APPLICATION TO SUBSTITUTE TRIAL COUNSEL

Application is hereby made by Sherman E. Unger, Esq., 2724 Dubois Tower, Cincinnati, Ohio 45202, for leave of Court to be substituted as trial counsel of record for Richard G. Donohoo and Piedmont Paper Products, Inc., in place of Jacob K. Stein, Esq. This application is made at the request of and with the consent of Richard G. Donohoo and Piedmont Paper Products, Inc.

Richard G. Donohoo
Richard G. Donohoo

Sherman E. Unger
Sherman E. Unger, Esq.
2724 Dubois Tower
Cincinnati, Ohio 45202
513/241-0820

PIEDMONT PAPER PRODUCTS, INC.

By Joseph G. Donohoo
Joseph G. Donohoo
President

OF COUNSEL:
John A. Lloyd, Jr.
Suite 610 Mercantile Library Building
Cincinnati, Ohio 45202
Phone: (513) 381-7200

CERTIFICATE OF SERVICE

This is to certify that copies of this Application to Substitute Trial Counsel were mailed to all parties of record this 4th day of MAY, 1978.

FILED MAY 4, 1978

FILED MAY 4 1978

RECEIVED
MAY [illegible] 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICHARD G. DONOHOO, et al.,)
Plaintiffs)
v.) NO. C-1-76-277
AMERICAN FINANCIAL CORPORATION, et al.,)
Defendants)

ROBERT HELFAND, et al.,)
Plaintiffs)
v.) NO. C-1-76-288
CARL LINDNER, et al.,)
Defendants)

HARRY LEWIS,)
Plaintiff)
v.) NO. C-1-76-291
CARL LINDNER, et al.,)
Defendants)

ORDER

An application to substitute trial counsel (Sherman E. Unger, Esq. in place of Jacob K. Stein, Esq.) has been filed.

Since the cases captioned are consolidated and are derivative in nature -

ORDERED that if there be any objection to the granting of the application - such may be filed within twenty (20) days.

United States District Judge

FILED JUNE 23, 1978

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

- - - - - - - - - - - - - - - - - -

Richard G. Donohoo, et al., :
Plaintiffs, : No. C-1-76-277
vs. :
American Financial Corporation, et al., :
Defendants. :

- - - - - - - - - - - - - - - - - -

Robert Helfand et al., :
Plaintiffs, : No. C-1-76-288
vs. :
Carl Lindner et al., :
Defendants. :

- - - - - - - - - - - - - - - - - -

Harry Lewis, :
Plaintiff, : No. C-1-76-291
vs. :
Carl Lindner et al., :
Defendants. :

- - - - - - - - - - - - - - - - - -

AFFIDAVIT OF JOSEPH G. DONOHOO

State of Ohio)
) SS.
County of Hamilton)

I, Joseph G. Donohoo, being first duly sworn, state as follows:

1. I am a stockholder and President of Piedmont Paper Products, Inc.

2. Piedmont Paper Products, Inc. is one of the plaintiffs in a consolidated action entitled Richard G. Donohoo, et al. vs. American Financial Corporation, et al., Case No. C-1-76-277.

3. In May, 1976 I received a telephone call from Mike Clauder, now of the law firm of Wood, Lamping, Slutz & Reckman, who informed me that he understood that I held stock in either American Continental Homes or American Financial Corporation. I informed Mr. Clauder that Piedmont held stock in American Continental Homes and that my son, Richard G. Donohoo, held stock in American Financial Corporation. Mr. Clauder then asked if we would be willing to undertake this lawsuit as plaintiffs, as they had no other parties who would do so. The subject of fees was not an item of long discussion due to the nature of the proposed lawsuit. The impression I received was that fees would not be an item of any concern to us. I never agreed during that conversation, or at a time subsequent to that conversation, to be responsible for any fees. With that tacit understanding, I told Mr. Clauder that both my son and Piedmont would act as plaintiffs.

4. Mr. Clauder never informed me, during that conversation, that he would be associating the firm of Paxton & Seasongood in this litigation. I had never met, spoken with or heard from Paxton & Seasongood, or Mr. Jacob Stein, until he responded to my letter of April 11, 1978 requesting that he cooperate with Messrs. Unger and Lloyd in this litigation.

5. Prior to undertaking this litigation, Mr. Clauder had not represented Piedmont Paper Products, Inc. in litigation or any other legal matter. Since undertaking this litigation, neither Mr. Clauder, Mr. Stein nor the firms of Wood, Lamping, Slutz & Reckman, or Paxton and Seasongood have represented Piedmont Paper Products, Inc. in further litigation or any other legal matter.

6. In the last several years Sherman E. Unger

has represented Piedmont in a number of legal matters and at various times in the past year I have been in contact with him to inquire whether he would undertake to represent Piedmont as additional counsel in this action.

7. On or about April 11, 1978, Mr. Unger indicated that he and John Lloyd, Esq. would agree to represent Piedmont Paper Products, Inc. as additional counsel.

8. On April 11, 1978 I requested Messrs. Unger and Lloyd to enter their appearances and notified Jacob K. Stein, Esq. of Paxton & Seasongood of my decision. A copy of said correspondence is attached hereto as Exhibit A.

9. On April 13, 1978 Messrs. Unger and Lloyd entered their appearances in this action and forwarded to me a copy of their entry of appearance. A copy of said entry of appearance is attached hereto as Exhibit B.

10. I was subsequently advised that Messrs. Unger and Lloyd were not receiving the cooperation of Paxton and Seasongood which I had requested in my letter of April 11, 1978. Accordingly, I sent a letter to Mr. Unger with a copy to Mr. Stein, setting out the views of Piedmont Paper Products, Inc. on this matter. A copy of said letter is attached hereto as Exhibit C.

11. On April 19, 1978 I received a letter from Mr. Stein responding to my letter of April 11. A copy of said letter is attached hereto as Exhibit D.

12. As a result of said letter I engaged in further conversations with Mr. Unger who stated that he and Mr. Lloyd would withdraw from the case if I felt it to be in the interests of Piedmont and thereupon sent a letter to Paxton and Seasongood and Wood, Lamping, Slutz & Reckman requesting they withdraw from the case

and turn over all of the papers in their files to Messrs. Unger and Lloyd. Copies of said letters are attached hereto as Exhibits E and F.

13. On May 3, 1978 I executed, on behalf of Piedmont Paper Products, Inc., an application to formally substitute Sherman E. Unger as trial counsel of record in this litigation. A copy of said application is attached hereto as Exhibit G.

14. On May 22, 1978, I wrote Mr. Osberger requesting a copy of the understanding regarding the payment of fees and expenses to which Mr. Stein had made reference in his letter of April 17, 1978. A copy of the May 22, 1978 letter is attached hereto as Exhibit H.

15. On May 24, 1978 I received a letter from Mr. Stein setting out his position on the substitution of counsel. That letter stated that if substitution was allowed by the court, I would be responsible for his fees. Mr. Stein stated that his firm would sue for the fees, which were incurred in this case, if necessary. The letter further suggested that I consult independent counsel with regard to this contention, and suggested a number of attorneys who might be contacted. A copy of said letter is attached hereto as Exhibit I.

16. On May 26, 1978 I received from Mr. Osberger a reply to my letter of May 22, attaching a copy of an authorization for the prosecution of this action. A copy of said letter and authorization are attached hereto as Exhibits J and K.

17. It is my determination, on behalf of Piedmont Paper Products, Inc., that Messrs. Unger and Lloyd represent the corporation in the prosecution of this lawsuit. This decision was made after almost two years of litigation during which time I was not informed by

any counsel representing Piedmont of the status and/or progress of this lawsuit, nor had I been informed, pursuant to the authorization, of any of the costs and expenses incurred during the prosecution of this lawsuit.

FURTHER AFFIANT SAYETH NAUGHT.

Joseph G. Donohoo, President
Piedmont Paper Products, Inc.

SWORN to before me and SUBSCRIBED in my presence this 22d day of June, 1978.

Notary Public

MICHAEL G. [illegible], Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration date, Section 147.03 O.R.C.

FILED JUNE 23, 1978

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Richard G. Donohoo, et al.,
Plaintiffs,
v.
American Financial
Corporation, et al.,
Defendants.

No. C-1-76-277

Robert Helfand, et al.,
Plaintiffs,
v.
Carl Lindner, et al.,
Defendants.

No. C-1-76-288

Harry Lewis,
Plaintiff,
v.
Carl Lindner, et al.,
Defendants.

No. C-1-76-291

AFFIDAVIT OF RICHARD G. DONOHOO

State of Ohio)
) SS.
County of Hamilton)

I, Richard G. Donohoo, being first duly sworn, state as follows:

1. I am one of the plaintiffs in a consolidated action entitled Richard G. Donohoo, et al. vs. American Financial Corporation, et al., Case No. C-1-76-277.

2. In May, 1976, Robert J. Blum, Jr. called me to inquiry if I had any shares of American Financial Corporation common stock. Mr. Blum is an officer of Piedmont Paper Products, Inc. Subsequent to that

conversation I had a further discussion with Mr. Blum regarding my participation in a proposed lawsuit against American Financial Corporation.

3. Following these conversations, I received a call from Mike Clauder, now of the firm of Wood, Lamping, Slutz & Reckman, to confirm that I was a shareholder in American Financial Corporation. I confirmed that fact. No further conversation regarding a proposed lawsuit against American Financial Corporation ensued at that time.

4. Mr. Clauder subsequently contacted my father, Joseph G. Donohoo, president of Piedmont Paper Products, Inc., who informed Mr. Clauder that both Piedmont and I would agree to become plaintiffs in this lawsuit. I was in agreement with my father's assent on my behalf.

5. At no time prior to the institution of this case had Mr. Clauder ever represented me in a legal matter. At no time subsequent to the institution of this case have Mr. Clauder, Mr. Stein, or the firms of Wood, Lamping, Slutz & Reckman and Paxton and Seasongood ever represented me in further litigation or any other legal matter.

6. On May 31, 1976, Mr. John Osberger, now of the firm of Wood, Lamping, Slutz & Reckman brought to my house a number of papers to be executed in connection with the commencement of this lawsuit. Among those papers was an authorization to the firms of Wood, Lamping, Slutz & Reckman and Paxton and Seasongood to proceed on my behalf in this action. As my wife had just gone into labor, I executed the documents presented to me without thorough review. Mr. Osberger, upon inquiry, stated that the authorization was something that was required for the files and was not a matter about which I should

be concerned. A copy of this authorization is attached hereto as Exhibit H.

7. At some time during the execution of the various documents I received the implication that I would not be personally responsible for fees, incurred in this case, but that any fees would be awarded through the court. I never agreed to be responsible for the payment of fees. My sole understanding is set out in Exhibit H.

8. At various times in the past year I have been in contact with Sherman E. Unger, Esq. to inquire whether he would undertake to represent me as additional counsel in that action.

9. On or about April 11, 1978, Mr. Unger indicated that he and John Lloyd, Esq. would agree to represent me as additional counsel.

10. On April 11, 1978 I requested Messrs. Unger and Lloyd to enter their appearances and notified Jacob K. Stein, Esq. of Paxton & Seasongood of my decision. A copy of said correspondence is attached hereto as Exhibit A.

11. On April 13, 1978 Messrs. Unger and Lloyd entered their appearances in this action and forwarded to me a copy of their entry of appearance. A copy of said entry of appearance is attached hereto as Exhibit B.

12. I was subsequently advised that Messrs. Unger and Lloyd were not receiving the cooperation of Paxton and Seasongood which I had requested in my letter of April 11, 1978. Accordingly, I sent a letter to Mr. Unger with a copy to Mr. Stein, setting out my views on this matter. A copy of said letter is attached hereto as Exhibit C.

13. On April 19, 1978 I received a letter from

Mr. Stein responding to my letter of April 11. A copy of said letter is attached hereto as Exhibit D.

14. As a result of said letter I engaged in further conversations with Mr. Unger who stated that he and Mr. Lloyd would withdraw from the case if I felt it to be in my interest that they do so. I indicated that such action would not be in my best interest and thereupon sent a letter to Paxton and Seasongood and Wood, Lamping, Slutz & Reckman requesting they withdraw from the case and turn over all of the papers in their files to Messrs. Unger and Lloyd. Copies of said letters are attached hereto as Exhibits E and F.

15. On May 3, 1978, I executed an application to formally substitute Sherman E. Unger as trial counsel of record in this litigation. A copy of said application is attached hereto as Exhibit G.

16. On May 24, 1978, I received a letter from Mr. Stein setting out his position on the substitution of counsel. That letter stated that if substitution was allowed by the court, I would be responsible for his fees. Mr. Stein stated that his firm would sue for the fees, which were incurred in the case, if necessary. The letter further suggested that I consult independent counsel with regard to this contention and suggested a number of attorneys who might be contacted. A copy of said letter is attached hereto as Exhibit I.

17. It is my determination that Messrs. Unger and Lloyd represent me in the prosecution of this lawsuit. This decision was made after almost two years of litigation during which time I was not informed by any counsel representing Piedmont of the status and/or progress of this lawsuit, nor had I been informed, pursuant to the authorization, of any of the costs and

expenses incurred during the prosecution of this lawsuit.

FURTHER AFFIANT SAYETH NAUGHT.

Richard G. Donohoo

Richard G. Donohoo

SWORN to before me and SUBSCRIBED in my presence this 23rd day of June, 1978.

Notary Public

MICHAEL E. KOHN, Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration date. Section 147.03 O.R.C.

Senator HATCH. Do you have any other comments about that matter? Were you able to substitute yourself in this case?

Mr. UNGER. No; I was not able to. And that touches on the AFC affidavits that we talked about the other day where I was called over and shown the affidavits that said if I withdraw my application to substitute they will not file the affidavits.

Senator HATCH. I see. In other words, this is what you were referring to last time, that these two gentlemen came to you and said that they would file affidavits against you unless you withdrew your——

Mr. UNGER. They invited me to their office. That is correct. They showed me the affidavits and said unless I withdrew my application they would file them.

Senator HATCH. How did you treat those requests or that suggestion?

Mr. UNGER. I really thought it was blackmail.

Senator HATCH. Did you treat it as blackmail?

Mr. UNGER. I ignored it. I filed my own affidavit saying what was true. When they did file their affidavits I disputed their affidavits in brief. I disputed their affidavits and asked—subsequently asked for a hearing on it, if necessary.

Senator HATCH. I see. Do you have anything else you care to say about that particular episode?

Mr. UNGER. The application to substitute counsel was not granted, but the judge took it seriously enough to write a 25-page opinion on it.

Senator HATCH. OK. That opinion, as I understand it is in the record, is it not, as one of the exhibits?

Mr. UNGER. Yes; it is.

Senator HATCH. Although Mr. Coleman and his committee did not make this allegation, our distinguished colleague from Ohio has suggested that there is some question as to the propriety of your past tax dealings.

Now, would you care to respond to that issue that was raised by Senator Metzenbaum last week? I think basically it came down to the fact that you had some income tax problems. There was some constructive income alleged by the IRS and Justice Departments, and that you had overlooked some $40,000 in earned income that you did not put into your return.

Would you care to discuss that and tell us why that should not be an issue in this matter? Apparently the ABA did not think so, but Mr. Coleman indicated that it might be.

Senator METZENBAUM. I think the ABA did not know about the $40,000. I think you will find——

Senator HATCH. I think that is correct. Mr. Coleman said that he did not know about the $40,000, and that if that is true, that may be an issue.

Mr. COLEMAN. That is if you look at question 19 and 20 that Mr. Unger submitted not only to the ABA but to the Justice Department. And if you look at paragraph 3 of exhibit 4, it is a letter that the Assistant Attorney General wrote to Mr. Unger with respect to that. And then I suggest you look at exhibit 5, which is Mr. Unger's reply to that. He just lied to the Justice Department and to me.

Senator HATCH. Mr. Unger, please respond to what Mr. Coleman has brought out here in open hearing.

Mr. UNGER. Well, I am not a liar, if that will give Mr. Coleman any comfort. The response to the questions he has talked about is, why did I withdraw my nomination from the FCC? It was a question that came to Justice—came from Justice to me. My response was that there was a constructive income issue that I was not able to resolve.

I would, if we are talking about 1968—and I believe this is what Senator Metzenbaum was talking about the other day—appreciate an opportunity to start at the beginning because it may be helpful.

Senator HATCH. Please do; we will be happy to hear it.

Mr. UNGER. I was not prepared Thursday when we talked about this. I did not know it was an issue. I had to get two law firms to get their files out of warehouses. I have substantially more information than I did then, and I think I can be more helpful and more precise, and I would be pleased to do that.

Essentially, in 19—April 15, 1969, to be exact, I did my own return late at night and got it filed shortly before midnight. In December 1969, I sold some stock that was the result of a merger of the upstream merger to which we referred when we talked about the constructive income.

Senator METZENBAUM. When was that, December 1960—when?

Mr. UNGER. In December 1969; yes, sir.

Senator METZENBAUM. 1969.

Mr. UNGER. Because I had rushed so hard to get my taxes done in 1968, one of the things that I did do was to determine that in 1969, I was going to get an early start and I was going to get it worked out. Well, in January 1969, I began to try to determine the basis for that stock which was the result of two mergers.

And in trying to determine the basis for the stock, I discovered that I had in fact had a sale of rights in 1968 and that that sale of rights was my basis. But it had not been included in my 1968 income tax return.

I discovered that, and in January 1970, I revealed that to the then-General Counsel of the Department of Treasury. His name is Paul Eggers. I have an affidavit from Mr. Eggers to the effect that I did in fact reveal it to him, and he in turn revealed it to Martin Worthy, the then-chief counsel of the IRS.

They advised me in January 1970 to file an amended return, and I did that.

Senator METZENBAUM. When did you do that?

Mr. UNGER. In January 1970.

Senator METZENBAUM. You did it in January 1970—you filed the amended return?

Mr. UNGER. No, sir. No, sir. I advised Mr. Eggers and Mr. Eggers in turn advised Mr. Worthy.

I continued to work on my taxes. I was also very busy. I took them to Florida and determined in March that I needed to do an income averaging or should do an income averaging to get the best benefit.

What I then did was to come back and meet on April 2 with a tax firm called Silverstein and Mullens in this city to consult with them.

Silverstein and Mullens subsequently wrote a letter to my Cincinnati tax counsel confirming that they suggested that it may not in fact be a taxable event. I concluded that I did not want any outstanding issues; I did not want any debate. I was willing to pay the tax.

Silverstein and Mullens called in Arthur Anderson. Arthur Anderson prepared an amended return, and that amended return was prepared by them on the 15th of May. It got to me on the 19th of May. I wrote a check for something just short of $17,000 and filed it on the—I guess the IRS received it the 20th of May, 1970.

Senator HATCH. Now, this was a tax on what total claimed by the IRS?

Mr. UNGER. There was no total claim at that time. We had not gotten to the audit stage. I revealed it to the Internal Revenue Service, and I prepared—I had the amended return prepared before I had met with any IRS agent.

Senator HATCH. OK.

Senator SPECTER. Is this the $40,000?

Mr. UNGER. Well, it turned out to be 37 something, Senator.

Senator SPECTER. Is this the item that you testified last week and $40,000?

Mr. UNGER. Yes, it is. It really turns out to be $40,000 less certain expenses.

Senator HATCH. So it turned out to be around $36,000 or $37,000.

Mr. UNGER. Yes, sir.

Senator HATCH. OK. We are not talking about the constructive income?

Mr. UNGER. No. We have not gotten to that yet.

Senator HATCH. OK. You will get to that. So, you are limiting your remarks right now to the alleged $40,000, which last week you indicated you had forgotten.

Mr. UNGER. That is correct.

Senator HATCH. Can you explain why you had forgotten it?

Mr. UNGER. I cannot explain why I forgot it or I would not have forgotten it. I do not know exactly how I missed it. I do know that I found it when I went back looking for my basis. I do know that I immediately revealed it to the Treasury Department. I do know that——

Senator HATCH. You filed an amended——

Mr. UNGER. I filed an amended return on it, and I do know that I paid it. Someplace along in there I did get a letter from a tax auditor saying in late March—it was a lady—she was going to audit my return. But I had previously revealed it to the Treasury Department.

Senator HATCH. Prior to her——

Mr. UNGER. Prior to receiving her letter; that is correct.

Senator HATCH. I see.

Mr. UNGER. I do have the opinion from Silverstein and Mullens that says that I could have contested it if I wanted to, that there was a theory that would make it nontaxable.

Senator HATCH. What triggered this, for you to go back over your financial information to determine the basis for this amended return?

Mr. UNGER. I obviously had some capital gain in the December 1969 sale, and I had to determine what that was. It was the first sale I had had of that stock. I had to determine its basis. And in determining its basis, I determined I had left something out of my 1968 return.

Senator HATCH. I see.

Senator SPECTER. Was not the $40,000 item that you testified to last week stock which you had acquired or cash that you got for a fee?

Mr. UNGER. It was not a fee, no, sir.

I had acquired certain—I can be more precise

Senator SPECTER. Did you not testify last week that it was a fee?

Mr. UNGER. I do not believe I said it was a fee. I believe I said it was a sale or I should have.

Senator HATCH. I think he did testify that the constructive income——

Mr. UNGER. No, sir.

Senator HATCH. OK. Go ahead.

Senator SPECTER. Do we have the testimony from last week?

Mr. UNGER. You have—last week I was testifying from the best of my memory. This week I am testifying from records.

Senator METZENBAUM. Well, Senator Specter, if it will help you, that the record says:

Senator SPECTER. You received a check for $40,000 for legal fees?

"Mr. **Unger**. Yes, sir."

Senator **Specter**. My recollection is that last week you testified—not just on page 19—that it was a legal fee, and that you then used that money to buy some stock in an immediate transaction, and that was later called to your attention, not that you called it to somebody's attention, but it was called to your attention by somebody else. And after it was called to your attention, you acknowledged that it should have been reported as income.

Mr. **Unger**. I think that is essentially my memory at the time. Now I have the records.

Senator **Specter**. That is different from what you are testifying today.

Mr. **Unger**. Yes, sir, it is. And now I have the advantage of the records.

Senator **Hatch**. I understand that because of that interrogation or those questions and answers that came up, you went back to the law firms that handled this for you, had them go back into the warehouse and get their files so that you could testify from documents rather than recollection.

Mr. **Unger**. Yes, sir.

Senator **Metzenbaum**. Mr. Unger, are you aware of the fact that your testimony is totally contradictory to the records of the IRS? Are you aware of that when you are testifying under oath that you discovered it.

Let me read you what the IRS says because they indicate that they were doing an audit of someone else's return. Let me find that.

Yes. "During the month of 1968"——

Senator **Hatch**. What are you reading from, Senator?

Senator **Metzenbaum**. I am reading from Internal Revenue Service document CP:D 161-5478, dated January 13, 1972, Sherman Edward Unger, as a supplement to our report of November 15, 1971.

Senator **Specter**. Excuse me, Senator Metzenbaum, do we have copies of that in the record?

Senator Metzenbaum. I am sure that you do. Well——

Senator **Hatch**. Without objection, we will place that in the record.

Senator **Metzenbaum**. In fact, I would suggest at this point that all of the Internal Revenue Service records that we have be placed in the record.

Senator **Hatch**. I think they are, but if they are not, we will place them in the record at this point.

[Material referred to follows:]

Department of the Treasury

Internal Revenue Service
Washington, DC 20224

Date: Jan. 13, 1972
In reply refer to: CP:D 161-5478

Sherman Edward Unger
2650 Virginia Avenue, N. W.
Washington, D. C.

As a supplement to our report of November 15, 1971, attached is a copy of a Supporting Statement concerning the tax matters of this individual. This case was settled on December 28, 1971.

This completes our report.

Sherman E. and Polly Unger | Supporting Statement

I. ISSUES

1. Whether taxpayer realized ordinary income in the form of increased equity or property interest for services rendered co-investors in the amount of $136,667 under Section 61 of the Internal Revenue Code.

2. Value of "other property" received in an exchange under Section 351(a) recognized under Section 351(b) as a long-term capital asset under Section 1202 in the amount of $11,250. (New issue raised by the taxpayer for the Government.)

II. PROPOSAL OF SETTLEMENT

Issue No. 1 - That the Government concede.

Issue No. 2 - That the taxpayer concede.

Note: Inasmuch as the negligence penalty attaches to the entire dificiency (partial agreement not in dispute) the taxpayer concedes the penalty applicable to Issue No. 2.

III. FINDING OF FACTS - LAW AND ARGUMENT

General

Because of the complexities of the issue, along with the designation of "sensitive" to the case, a short recitation of the indirect facts to the issue but germane to the case is deemed appropriate. Because of the close proximity of the two issues it is believed more coherent and less involved to refer to the two issues as one. Mr. Sherman Unger, will hereinafter interchangeably be referred to as the taxpayer and Mr. Unger and Modern Talking Picture Services, Inc., will hereinafter be referred to as MTPS, Inc.

During the month of August 1968 while the examining officer was examining the returns of some other corporate taxpayers and related returns, it came to light that $40,000 was paid to the taxpayer "for right to acquire one-third of all the outstanding common stock of Motion Talking Picture Service, Inc., a Delaware Corporation for the the price of $27.00 per share" (see statements sent to Mr. J.T. Resor, Midwest Venture Capital Corporation, and Ohio Venture Capital Corporation dated June 11, 1965). These amounts were subsequently paid during the month of June 1968. Subsequent examination of the taxpayer's return for the year 1968 disclosed that the $40,000 was not reported by the taxpayer in the year under consideration.

Because of the omission of the income as determined by the District Director, the case was referred to the Intelligence Division of the office of the District Director, which branch after thorough investigation and study withdrew from the case and recommended that prosecution not be instituted(See Intelligence Report dated August 25, 1970.)

While the Intelligence Division was considering the case, the taxpayer filed an amended return in which he included the $40,000 as income less expenses and paid an additional tax of $16,988.99.

Upon further audit examination, after the Intelligence Division withdrew from the case, the office of the District Director determined that the taxpayer realized income from services to co-investors (in the same transaction that gave rise to the $40,000 payment) in the amount of $136,660.67 as recited below. In addition to the $40,000 item a finding was made on other small items and the negligence penalty of 5% was proposed on the deficiency along with the tax due, so that at the conclusion of the audit the taxpayer's deficiency on other than the issue in controversy was $20,748.01 in tax, and $1,037.40 negligence penalty, against which the $16,988.99 was paid on the amended return. Subsequently, the taxpayer paid the balance.

The taxpayer then protested to this Division as recited in Issue No. 1 the following:

Issue No. 1 and 2 - Finding of Fact

In the latter part of 1967, or the forepart of 1968, the exact date not a matter of record, Mr. Unger, the taxpayer, learned that the common stock of Modern Talking Picture Services, Inc., hereinafter referred to as MTPS, Inc., was available for sale by Rosalie M. Arlinghaus, widow of the former MTPS, Inc., and owner of substantially all the shares. A Mr. Eberle held a small amount of the stock.

The offering price of the stock was approximately $2,500.00. It is fairly well documented through the file and admitted by the taxpayer in conference that he was virtually without funds and a substantial line of credit was not available to him. He approached a Mr. Resor and a Mr. Taylor, who had substantial interests in Midwest Venture Capital Corporation and Ohio Venture Capital Corporation. According to the testimony, he recited to them the profit making history and potential of the MTPS business and convinced them that it was an excellent buy, but that he was without funds and that he desired to own one-third of the corporation after its acquisition. They agreed to work out the details of the acquisition.

On May 10, 1968, an offer was tendered to Mrs. Arlinghaus and Mr. Eberle by the taxpayer for all the shares to be purchased for $2,551,500. On May 31, 1968, they accepted the offer of Mr. Unger.

According to the offer, the exact terms were for the acquisition of 94,500 shares at $27.00 per share, or as an alternate, the acquisition of all the assets of MTPS, Inc., for the total amount of $2,551,500 in cash.

It was ultimately agreed to acquire the entire amount of the 94,500 shares. In order to accomplish this a corporation was formed under the name of Modern Media, Inc., as evidenced by the minutes of the meeting of June 7, 1968, which recited that Resor, Unger and Taylor (for Ohio Venture and Midwest Venture Corporations) subscribed to the 600 shares of common stock of Modern Media, Inc., for $150 per share, plus one-sixth hundredth (1/600) of the right to purchase all the outstanding 94,500 shares of Modern Talking Picture Service, Inc., for a full price of $27.00. Of this $90,000 capitalization, our taxpayer, Mr. Unger, contributed $30,000 for his 200 shares of the 600 shares issued. In order to raise the money to acquire the MTPS stock, Modern Media, Inc., effected a loss from the First National Bank of Cincinnati, Ohio, for approximately $2,100,000. In order to raise the balance Resor loaned the corporation $200,000.00 receiving a personal note, and Taylor, through Modern Media and Midwest Venture Corporations loaned the corporation $100,000.00 each, and they in turn each received a note from the corporation. All three notes totaling $400,000.00 were subordinated to the loan of $2,100,000 secured from the First National Bank of Cincinnati, Ohio.

According to the prospectus filed with the Security & Exchange Commission on June 6, 1969, the "historical" net income of the corporation for the year ended June 30, 1968, was 50¢ per share on which a cash dividend of 8¢ per share was paid.

In the stock purchase agreement of June of 1968, between Ensor, Unger, Ohio Venture, Midwest Venture and Modern Media, there is a provision that no stockholders can transfer without consent of any other stockholders, the common stock of Modern Media unless he has offered his stock to Modern Media, the corporation and/or other stockholders and the offer has not been accepted. On August 27, 1968, the 94,500 shares of MTPS, Inc., stock held by Modern Media was split 4 to 1 so that there was then 378,000 shares. In the next month of September there was a sale of MTPS, Inc., debentures of $800,000.00 which was distributed to Modern Media who in turn paid The First National Bank the sum of $800,000.00 as a partial repayment on its loan of $2,100,000.

According to the statements made by Mr. Unger in conference in this Division, he stated that it was never his intention that the stock of MTPS, Inc., go public, but that his two co-investors, Resor and Taylor, prevailed as they could see a prospect of substantial profits from the stock if it was offered to the public. Accordingly, an underwriter was hired to draw up the prospectus and application to the Security & Exchange Commission.

According to the file and the statements made by the taxpayer in conference, the underwriter felt that it was detrimental to the permission sought from the Security & Exchange Commission to go public if the $400,000.00 of indebtedness showed as owing to Resor and the two Venture Corporations remained on the books, albeit, that it was clear that the $400,000.00 was subordinate to the primary obligation of The First National Bank. Accordingly, on December 3, 1968, by letter, Resor and Taylor (on behalf of Ohio Venture and Midwest Venture) tendered their respective notes for the total amount of $400,000.00 marked cancelled, and asked that the total amount be treated as tender as a contribution of capital. The net worth per books of Modern Media immediately following the surrender of the notes on December 3, 1968, was $465,000.00.

On December 4 and December 6, 1968, the stockholders and Board of Directors of Modern Media agreed to effect a "downstream" merger in which Modern Media would be merged into Modern Talking Picture Service, Inc., with the latter the surviving corporation. In order to effect the merger, 650 shares of capital stock of MTPS was exchanged for each share of capital stock of Modern Media. The stockholders in turn were distributed the capital stock of Modern Talking Picture Service, Inc. Accordingly, Mr. Unger, our taxpayer, received 126,000 shares of MTPS, Inc., common stock.

On June 6, 1969, a prospectus for permission to go public was filed with the Security & Exchange Commission. (See copy enclosed in the file.)

According to the statements of Mr. Unger in conference in this Division, the earnings of Modern Talking Picture Service, Inc., took a decided turn for the worst for the year 1969 and upon advice of underwriters the application for going public was withdrawn from the Security & Exchange Commission in November of 1969. On November 21, 1969, as evidenced by the Minute Book of that date, MTPS, Inc., was merged into the KDI Company, a conglomerate based in Cincinnati, Ohio. The details of the merger were that 1 share of KDI common stock would be exchanged for each 4 shares of MTPS common stock. According to the taxpayer in conference in this Division there was a restriction, however, upon the 50,400 shares that he received in the exchange in that he had to secure the permission of the Board of Directors of KDI for the sale or disposition of the KDI common stock.

In late 1970, or early 1971, the KDI Company experienced financial difficulties and is presently operating under a creditor's committee after filing a petition for reorganization under Chapter XI of the Bankruptcy Act. According to statements made in conference in this Division the stock sells for $1.50 to $2.00 per share if permission is secured from the corporation to sell such stock because of Security Exchange Commission's rules relating to "pooling of interest." As of January 4, 1971, the value of the total investment of all former stockholders in MTPS, Inc., was $187,500 (see page 6 of the Protest.)

Law and Argument

Upon receipt of the offers of acceptances dated May 31, 1968, of the taxpayer's offer to purchase the MTPS stock from Mrs. Arlinghaus and Mr. Eberle, the taxpayer and Messrs. Resor and Taylor (for the Venture Corporations) organized Modern Media, Inc., and effected a transfer of their rights to acquire the MTPS, Inc., stock, plus $150 in cash for each of the common shares of Modern Media, which latter corporation had been organized for the actual purchase of the MTPS common stock. Mr. Unger had sold to Messrs. Resor and Taylor (for the Venture Corporations) two-thirds of his rights to the acquisition of MTPS stock for $40,000, half of which was billed as acquisition of rights $20,000 and the balance of $20,000 as expenses incurred. No part of the $40,000 was reported as income on the original return filed by the taxpayer, but after the examination of his return was started an amended return was filed in which he reports the sale of two-thirds of his rights for $40,000 less reimbursement costs for a balance of a short-term capital gain of $36,556.85. In a subsequent audit of this return the District Director determined that from the transaction $37,306.14 was for "services" in lieu of the above amount reported as a short-term capital gain by the taxpayer on his amended return. The deficiency in tax plus negligence penalty on this transaction was subsequently paid.

In addition to the above amount, the District Director determined that in this same transaction he received $136,666.67 as "services to co-investors." The District Conference Report through the uniform issue number (0061.09-00) label this amount income under Section 61 of the Code. In addition thereto, the examining officer proposes that this amount is within the purview of the last sentence of Section 351(a) which reads -

> "For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property."

The essence of the District Director's position is that the loans of $400,000.00 by Resor and the two Venture Capital Corporations were in substance contributions of capital because the corporation was "thinly" capitalized. Because the taxpayer was not required to put up an additional one-third, his one-third investment in the corporation was enhanced to the extent of the one-third of the loans when considering that in substance they were capital contributions as evidenced by their conversion to this category as paid-in capital on December 3, 1968. It is further argued in the preliminary determination that when the "thin capitalization" doctrine is applied to the debt vs. equity facet of the issue that a substantially disproportionate distribution of stock to the taxpayer was received by Mr. Unger in payment of Mr. Resor's and Mr. Taylor's part of the two corporations' obligations to the taxpayer. Section 1.351-1(b)(1) of the Regulations is cited.

The so-called "thin capitalization" doctrine is fraught with substantial hazards in litigation as are all issues in which substance is being argued over form. Support for this doctrine finds its genesis in this venue in the case of Gooding Amusement Company, Inc., 236 Fed. 2d. 159, 49 AFTR 1973, when the Circuit Court of Appeals for the 6th Circuit (which would be the venue for our taxpayer) decided in 1956 that notes in that case were in substance equity capital. It was a strong decision for the Government and it was quoted and applied with great force and effect. Then in the year 1960 the same Circuit Court of Appeals in the case of Byerlite Corporation, 6 AFTR, 2d. 6069, in effect backed away from its decision in Gooding Amusement Company, Inc., supra. (at least to some extent) and decided in favor of the taxpayer. There followed various adverse decisions to the Government of this "thin capitalization" issue such as in the case of Toulisses (sp) vs. 1661 Corporation, 377 Fed. 28, 291, 19 AFTR 21 1413, COA-5 (1067); and J.S. Biritz Construction Company, 367 Fed. 2d. 451, 20 AFTR 2d. 5801, COA-8, (1967). As a consequence the doctrine of "thin capitalization" is today highly litigated with its outcome in doubt.

But what appears to be even more detrimental to the successful litigation of this case is that the Commissioner has to effect what amounts to a creation of income over and above the $40,000 reported in order to give rise to an amount which was omitted from taxation by the taxpayer. This facet of Federal income taxation was dealt with quite forcibly in the case of Bolcoy vs. Commissioner, 2 AFTR 2d., 5660, 258 Fed. 2d. 865, COA-3, 1958. The opinion of the Court and its dictum will be further discussed.

The taxpayer, on the other hand, is quite vehement both in the conference and the protest filed that the $40,000 received from Resor and Taylor (on behalf of the two Venture Corporations) completely satisfied the "finder's fee" of sale of rights reported as a short-term capital gain and that no further incident of taxation arose or is appropriate in the transaction. They direct our attention to the affidavits of Mr. Resor and Mr. Taylor that they considered the $400,000.00 in notes as valid and binding obligations of Modern Media, Inc., and they fully expected to be repaid for such loans. Page 9 and again on Page 13 of the Protest, they state that the direction to the officers of Modern Media, Inc., in December of 1968, to transfer their $400,000.00 in loans to capital contributed had no bearing whatsoever upon their expectations of repayment in June of 1968 because it was not until December of 1968 that the underwriters proposed this action prior to MTPS, Inc., stock going public.

The thrust of the District Director's position is that Mr. Unger went into the proposition with Taylor and Resor with the understanding that he would eventually own one-third of the outstanding common stock of MTPS, Inc., without investment of dollars or credit, neither of which he had; and once having obtained this objective, which he did in our taxable year, there arose an incident of taxable income that must be taken into account. There is no question but that the $40,000 paid in cash as a finder's fee is taxable income. The tax has now been paid on this amount. The amount of $30,000 of this $40,000 received was invested in Modern Media, Inc., which after a downstream merger into MTPS, Inc., resulted in the taxpayer receiving one-third or 126,000 shares of the outstanding common shares of MTPS, Inc. When a very limited number of shares were sold subsequent to the year under consideration, capital gain was reported using as a basis the allocable part of the $30,000 invested.

Aside from the above finder's fee of $40,000, where is the necessary ingredients to fix an amount of taxable income for the year under consideration? The District Director maintains that the loans made to Modern Media were in substance equity capital and the taxpayer's investment was enhanced in the amount of $136,667.00. The Third Circuit Court of Appeals in the opinion of Halsey vs. Commissioner, supra, strongly mitigates against this creation of income when it states in its opinion--

> "But these benefits operated only to increase the value of the taxpayer's stock holdings; they could not give rise to taxable income within the meaning of the 16th Amendment until the corporation makes a distribution to the taxpayer or his stock is sold." Eisner vs. Macomber, 1900, 252 US 189 (3 AFTR 3020); Schmidt vs. Commissioner of Internal Revenue, COA-3, 1954, 208 F. 2d 819 (45 AFTR 37).

Further, in this opinion, the Court in citing Ferro (sp) vs. Commissioner of Internal Revenue, 50 AFTR 2084, 2087, Third Circuit, 1967, 242 Fd. 838, 841, comments:

> "The application of that criteria (stated in the Ferro vs. Commissioner case) to the facts of this case compels the conclusion that in the absence of a direct promiary (sp) benefit to the taxpayer the Tax Court erred in holding the distribution in question taxable to him." (Underscoring supplied.)

However, the magnitude of the transaction is such that it is almost impossible to envision the situation where the Government would have absolutely no merit. For example, if MTPS, Inc., would have been successful in going public the taxpayer stood to gain between $1,500,000.00 and $2,000,000.00 on his $30,000 investment according to the speculation of the underwriters, who projected the MTPS, Inc., stock as selling between $12 to $16 per share.

But in the year 1969 the application to go public was withdrawn when the earnings of MTPS, Inc., turned downward. The subsequent trade of the MTPS, Inc., stock for KDI stock could eventually result in a very profitable transaction, but again this is speculation, that runs afoul of the pronouncement as set forth in Holsey, supra.

The representatives recognize that the Government does have some merit in that the taxpayer realized something more than just the $40,000 in securing the right to the acquisition of all the MTSP, Inc., stock on May 31, 1968. The question remains as to how to value this "right" to acquire all of MTPS, Inc., common stock.

Solely for the purpose of settlement the representatives proceed down the line of the $400,000.00 in loans eventually enhancing the capital structure of Modern Media when the notes were cancelled by the other shareholders and converted to paid-in capital on the books of Modern Media, Inc., on December 3, 1968. For purposes of settlement there is recognized as enhancement of the taxpayer's investment as of December 3, 1968, as set forth in the written offer of settlement dated November 9, 1971, enclosed in the file. But the point is made quite forceably that the $400,000.00 in notes did not have a fair market value anywhere near the face amount as they were subordinated to a $2,000,000 loan with the First National Bank of Cincinnati, Ohio. Taking into account this undetermined face value of the notes, along with the fact that our taxpayer was a minority stockholder, along with the fact that the stock was subject to a restrictive agreement in that it was to be sold first to the corporation or other stockholders, a determination for a settlement is proposed in the amount of $41,250.00 as a value to be recognized. From this amount the $30,000 invested by our taxpayer in the capital stock is subtracted and leaving the value of the $11,250.00 which is to be recognized as "other property" received in the exchange under Section 351(b) of the Code and Regulations Section 1.351-2. For purposes of settlement, this, of course, is to be considered a capital asset held for a period of longer than 6 months, the holding period running from May 31, 1968 until December 3, 1968, the date when the notes were surrendered to the corporation and transferred on the books of Modern Media, Inc., from loans payable to paid-in capital.

IV. CONCLUSION

It is concluded that the offer be accepted as representing the value of the case when including the $40,000 "fee" already taxed and paid.

Department of the Treasury

Internal Revenue Service
Washington, DC 20224

Date:
April 15, 1971

In reply refer to:
CP:C:D 161-5478

Sherman Edward Unger
2650 Virginia Avenue, N. W.
Washington, D. C.

This supplements our report of February 19, 1969.

Our records show that income tax returns were timely filed for 1968 and 1969. There is no record of unpaid taxes or liens concerning these returns.

The returns for 1967, 1968, and 1969 were examined by our Audit Division with the following results:

1967. Agreed deficiency of $2,776.31; interest, $431.96; total of $3,208.27 paid December 24, 1970. Issues involved disallowance of a dependency exemption and certain itemized business expenses.

1968. Agreed deficiency of $20,748.01; interest, $1,477.57; negligence penalty, $1,037.40; total of $23,262.98 paid in two payments -- $16,988.99 on May 20, 1970, and $6,273.99 on December 31, 1970. Issues involved disallowance of a dependency exemption, disallowance of certain business expenses, and additional income from a finder's fee. An amended return was filed prior to closing of the examination with which taxpayer paid the $16,988.99 mentioned above. There remains an unagreed issue on the 1968 return ~~which~~ involves a proposal to add $136,666.67 to the taxpayer's income for additional finder's fees in regard to a stock transaction. This involves a highly technical question as to whether the~~re is~~, in fact, income, and if so, the amount. A District audit conference was held April 2, 1971, but nothing was resolved. If it is determined that the $136,666.67 is taxable income, a deficiency of $77,483.26, plus negligence penalty of $3,874.16 will be asserted.

1969. Agreed deficiency of $315.76; interest, $11.21; total of $326.97 paid December 23, 1970.

We will write you further concerning the 1968 audit.

Department of the Treasury

Internal Revenue Service
Washington, DC 20224

Date: May 20, 1971
In reply refer to: CP:C:D 161-5478

Sherman Edward Unger
2650 Virginia Avenue, N. W.
Washington, D. C.

This supplements our report of April 15, 1971.

A District audit conference was held on April 22, 1971. Another conference is expected to be held, but no date has been set. There are no new developments.

We will advise you further concerning this matter.

Department of the Treasury

Internal Revenue Service
Washington, DC 20224

Date:
July 30, 1971

In reply refer to:
CP:D 161-5478

Sherman Edward Unger
2650 Virginia Avenue, N. W.
Washington, D. C.

This supplements our report of May 20, 1971.

The examination of the 1968 return was completed June 25, 1971, resulting in a proposed deficiency of $77,483.26, plus negligence penalty of $3,874.16. The taxpayer did not agree to our findings and the matter has been referred to our Appellate Division for consideration.

We will furnish a further report upon completion of this matter.

Department of the Treasury

Internal Revenue Service
Washington, DC 20224

Date: Nov. 15, 1971
In reply refer to: CP:D 161-5478

Sherman Edward Unger
2650 Virginia Avenue, N. W.
Washington, D. C.

This supplements our report of July 30, 1971.

This case is still pending with our Appellate Division. A conference was held recently and a proposed settlement was submitted which will be rejected. It is anticipated that a counter proposal will be submitted shortly.

We will advise you further concerning this matter.

LAW OFFICES
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(202) 833-8810

CABLE ADDRESS
"SILVERTAX"

September 15, 1970

William R. Seaman, Esquire
Frost & Jacobs
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Dear Bill:

Sherman Unger has asked that we review our files relative to issues respecting the tax treatment of Modern Media, Inc.

On April 2, 1970, Sherman, at luncheon, described the general nature of the transaction in question. Although Sherman appeared to assume that $40,000 less applicable expenses represented the taxable amount, and the transaction was ultimately reported in such manner in the amended return later filed, my colleagues and I felt that inquiry should be made to determine whether sufficient basis was afforded to treat the transaction in whole or in part in a nontaxable manner. More specifically, we inquired, and indeed suggested to Sherman that the following rationale could be advanced: All of the rights to purchase Modern Talking Pictures were constructively contributed to Modern Media, Inc. in a transaction not taxable to Sherman or to Modern Media by reason of section 351 of the Internal Revenue Code and that thereafter, and again constructively, Modern Media sold two-thirds of such rights to Messrs. Taylor and

Resor, all as part of the same "section 351" transaction. We were, of course, aware of the fact that in applying section 351, any portion of shares received by a transferor, such as Sherman, for services rendered would not be subject to the nonrecognition provisions of that section of the Code.

Upon examination of the minutes of Modern Media, the invoices prepared and delivered by Sherman to Messrs. Taylor and Resor and under all the circumstances of the situation, we determined (following discussions with Messrs. Arthur Andersen and Company) that the transaction should be reported in the manner reflected in the amended return.

Sincerely,

SILVERSTEIN AND MULLENS

Leonard L. Silverstein

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

August 11, 1983

Mr. Robert J. Short
Chief Investigator
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Duke,

Pursuant to our conversation yesterday, I have been able to locate the protest filed concerning my 1968 tax matter. Accordingly, I enclose two copies, one for you and one for Senator Metzenbaum's staff. In addition, I have been able to locate a copy of the settlement agreement that was the outcome of that protest, two copies of which are enclosed for the same purposes.

I will continue to look for additional documents though, as you know, we are searching for papers that go back a number of years.

Thanks for your assistance. Kindest regards,

Very sincerely,

Sherman E. Unger

Enclosures

cc: Jonathan C. Rose, Esq. (w/encs.)

FORM 3610 (REV. OCT. 1968)	DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE **AUDIT STATEMENT**			SYMBOLS AP:C1:SFS:GH
NAME OF TAXPAYER ~~(PETITIONER)~~ Sherman E. and Polly V. Unser				
KIND OF TAX Income				~~DOCKET NUMBER~~
TAX YEAR ENDED	DEFICIENCY			OVERASSESSMENT
Dec. 31	Tax	Addition to Tax [Negligence] Sec. 6653(a)		
1968	3.023.42	$ 151.17		

AFFIDAVIT OF LORRAINE F. WOOD

1. Mr. Unger prepared his 1968 Federal Income Tax Return on the night of April 15, 1969. Mr. Unger prepared the return himself in his office at the Department of Housing and Urban Development. When he completed the return, he asked me to make a xerox copy. He left the office shortly before midnight and asked his driver, who was standing by in the lobby of the building, to take him by the Post Office so that he could mail his return before the midnight deadline.

2. Mr. Unger made it a point that he did not want to wait until the last minute to do his income tax return for the following year, so he asked that we keep reminding him to start early. I believe I first reminded him when we received our W-2 forms, which was early in January 1970.

3. Mr. Unger asked that we obtain a copy of the Federal Tax Handbook so that he could read about the new Tax Reform Act which was passed in December. A requisition was submitted and the Tax Handbook was purchased on January 13, 1970.

4. Mr. Unger asked that I gather together all the Merrill Lynch, Pierce, Fenner & Smith forms he received during 1969 and put them with his 1969 tax file. In addition, he asked that I look through his check stub book for interest payments made to Provident Bank and the Cincinnati Trust Company. I typed this information for him and put it with his 1969 tax file.

5. Mr. Unger came out of his office one day in February or early March and handed me a sheet of his note paper and asked that I compute the figures on the paper. He indicated he had some type of a tax problem and asked that I use Mr. Schechter's computer to divide the figures. I put the answer on a 3x5 card and gave it to Mr. Unger.

6. Mr. Unger, in preparing for his trip to Florida on March 12th, asked that I pull together all of his 1968 and 1969 income tax files, together with the tax handbook. He hoped to have time while on vacation to work on his taxes.

Lorraine F. Wood
Lorraine F. Wood

Subscribed and sworn to before me this 10th day of September, 1970.

(Notary Seal)

BERNARD E. BANKS
Bernard E. Banks
Notary Public.
My Commission Expires June 14, 1971

AFFIDAVIT OF FRANCES L. SIGNER

1. In preparing his 1968 return, Mr. Unger was greatly delayed due to his nomination in January of 1969 to the position of General Counsel of the Department of Housing and Urban Development and the many subsequent duties involved in the assumption of and orientation in connection with this new position. I recall his doing the final work on his 1968 return on the night of April 15, 1969, and its being mailed shortly before midnight that night.

2. For the above reason, Mr. Unger made a particular point of starting preparations for his 1969 return early in the month of January, 1970. In addition, the passage of the Tax Reform Act on December 30, 1969, focused everyone's attention on the subject of Federal taxes. As I recall, when Mr. Unger returned from holiday leave on January 5, he requested that we obtain for him pamphlets and tax handbooks. This request was made to the Legislative Reference Section of our office which supplied some materials. It is my recollection that the W-2 forms were distributed on January 9. At this time, Mr. Unger said that the reference material obtained for him was not sufficient and a requisition (copy attached) was submitted by the Administrative Officer for the Office of General Counsel and these books were purchased on January 13.

3. Prior to Mr. Unger's departure for Florida on March 12 to join Mrs. Unger, who was spending several months there, and the children who were spending the Spring vacation there, I recall that he asked Mrs. Wood to be certain that he had his 1968 and 1969 tax files and the tax handbooks ready to take with him in order that he might complete the preparation of his return while he was in Florida.

4. Mr. Unger's stay in Florida was interrupted by several emergency trips back to Washington in connection with the activities and meetings of the Urban Affairs Council. To the best of my knowledge, he did not complete his 1969 return while in Florida.

Frances L Signer
Frances L. Signer

Subscribed and sworn to before me this 10th day of September 1970.

(Notary Seal)

BERNARD E. BANKS
Bernard E. Banks
Notary Public
My Commission Expires June 14, 1971

U. S. DEPARTMENT
OF
HOUSING AND URBAN DEVELOPMENT

REQUISITION FOR SUPPLIES AND EQUIPMENT

(2-66)

REQUISITION NO. A-OGC-70-117

DATE January 13, 1970

DELIVER TO		FOR SERVICES USE ONLY	
NAME Annette Blood	EXT. 57144	APPROPRIATION	POSTED BY
BUILDING	ROOM NO. 10230	P. O. NO.	FILLED BY
DIVISION AND BRANCH Office of General Counsel		P. O. DATE	B. O. NO.

ITEM NO. (Catalog or Form)	DESCRIPTION	QUANTITY	UNIT OF ISSUE	UNIT PRICE	AMOUNT
	Please obtain the following pamphlets for Mr. S. Unger, General Counsel, today:				
	1970 Federal Income Tax Handbook, cost $2.75	1	each		
	Explanation of 1969 Tax Reform Act, cost $1.25	1	each		
	Available from: Mr. Fugate Suite #203 1701 Pennsylvania Ave., NW				
	Rec'd				

I certify that the supplies and/or equipment requisitioned above have been received

(Date) (Receiving Employee)

REQUESTED BY (Signed) ANNETTE BLOOD

TITLE Administrative Officer

217-16-1 HUD-Wash., D. C.

AFFIDAVIT

STATE OF OHIO)
) SS:
HAMILTON COUNTY)

WILLIAM R. SEAMAN, being first duly cautioned and sworn, deposes and says that he has known Sherman Unger for fifteen years, for most of which time they were associated in the practice of law; that he has found Unger to be unfailingly honest, conscientious, industrious and intelligent; that he is aware of the fact that Unger filed an amended federal income tax return for the year 1968 and has investigated the causes, content and circumstances surrounding the filing of that return; that affiant is convinced in his own mind that Unger's original 1968 return reflects an honest mistake and that in no respect did any underpayment of tax by Unger constitute an effort to avoid or evade taxes or an attempt to defraud the revenue; that this affiant's opinion is based not only upon a belief in Unger's character and integrity, but also upon the fact that all relevant transactions were so recorded by Unger as to negate any intent to conceal the facts or improperly reduce his tax as well as the fact that, after advising with officials of the Treasury, specialized counsel and well qualified independent certified public accountants, he filed an amended return and paid what he was advised and believed to be the correct tax as rapidly as he reasonably could, taking into account the heavy demands on his time.

William R. Seaman
William R. Seaman

Sworn to before me and subscribed in my presence this 14th day of September, 1970.

David E. Nelson
Notary Public

DAVID E. NELSON, Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date
Section 147.03 R. C.

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

September 30, 1983

Honorable Arlen Specter
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

Since the hearing this morning, I have attempted to get copies of my 1968 tax return from Arthur Andersen & Company, both in Cincinnati, Ohio and Washington, D.C. (both of whom had copies of the amended return). Each office reported that they had checked their files but that they have a record destruction program eight years after the return year. I have located no personal copy; however, I have located a settlement file which provides a great deal of the information which you requested. Tab A reflects the Preliminary Statement of the Alleged Deficiency by the auditor -- that is Form 1907. That form indicates I filed an amended return for the year in question, 1968, on May 20, 1970 and paid an additional tax of $16,988.99.

Enclosed as Tab B is the protest filed on my behalf by Cincinnati counsel which emphasizes the constructive income claim, though the bottom of page 4 shows the $40,000.00 figure mentioned by Senator Metzenbaum was not for services rendered but a sale of rights. The protest indicates that at least $30,000.00 of that went immediately back into the newly formed company and not through my personal or business checking accounts. I will continue to try to reconstruct that transaction.

Enclosed as Tab C is Form 3611, which is a settlement calculation which, if I am reading it properly, indicates that the IRS did drop their constructive income theory and converted to a capital gains theory which occasioned $5,625.00 of taxable income which was agreed upon and paid in late 1971 by a tax of $3,023.42 and a penalty of $151.17.

In addition, for your confidential information, I enclose a summary of my taxable income and taxable liability recently prepared by Arthur Andersen for the years of 1977-1982 that shows for the last six years I have paid federal taxes in excess of 50 percent of my total taxable income. While I recognize it is not totally in point when reviewing the precise 1968 issue, I believe it is a reasonable indication of my approach to my duty to pay taxes.

In addition, you requested I make available a copy of the Carl Ruediger letter referred to in the July 10, 1970 Office of Legal Counsel opinion of Mr. Rehnquist. Enclosed is a copy of that letter dated June 19, 1970 secured from the Office of Personnel Management this afternoon. We were advised that incoming letters are destroyed after two years and that my letter of June 9, 1970 has been destroyed.

I sincerely hope that these documents are of assistance in resolving your concerns.

Very sincerely,

Sherman E. Unger

Sherman E. Unger

Enclosures

FROST & JACOBS

WILLIAM R. SEAMAN
R. G. GLAUSCHTER
CHARLES G. PUCHTA
JAMES G. HEADLEY
HENRY W. HOBSON, JR.
JOHN C. ECKERT, JR.
CHARLES A. ATWOOD
JOHN A. LLOYD, JR.
DENNIS J. BARRON
JERRY L. COWAN
CARL R. HUFFMAN
JAMES B. WACHS
JOHN R. ROSE
DONALD E. HEINLEN
DONALD McG. ROSE
JAMES G. ADAMS

WILLIAM G. SACKETT, III
JOHN C. NEWLIN
JOHN S. STITH
BRUCE F. LOWE
F. BRUCE ABEL
DAVID D. DODGE
EDMUND J. ADAMS
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COUNSEL

HENRY G. FROST, 1910-1961
CARL M. JACOBS, 1910-1967

2900 DuBOIS TOWER
511 WALNUT STREET
CINCINNATI, OHIO 45202

TELEPHONE 513 621-6660

CABLE ADDRESS "FROSTJAC"

October 12, 1971

Mr. Joseph J. Schrantz,
Conferee-Special Assistant,
Appellate Division,
Internal Revenue Service,
P. O. Box 2026,
Cincinnati, Ohio 45201.

Re: Sherman Unger - 1968 Income Tax

Dear Mr. Schrantz:

At our recent conference in connection with the above matter we came to no resolution of our divergent views. You did make it clear, however, that in your opinion the case did not justify total concession on the part of the Service. On the other hand, you were equally clear in that it would justify consideration of a settlement proposal.

We feel that at the conference we placed on the table the reasons why we felt that no taxable event had taken place which would have resulted in realization of income taxable to Mr. Unger in the years under audit as well as our reasons for believing that if there had been a taxable event, it would have resulted in a loss to Mr. Unger. Any offer in compromise, however, must assume a taxable event in 1968 and the receipt of some income by Mr. Unger. //We have, therefore, attempted to construct an offer around a rationale relating to the value which the taxpayer might be viewed as having received at the time shares of stock of H.T.P.S. were distributed to him in December, 1968.

We have agreed that immediately after the downstream merger of Modern Media into M.T.P.S. which resulted in the distribution of M.T.P.S. stock to the former shareholders of Modern Media, the book, net worth of M.T.P.S. was $465,000. Of this amount, $400,000 was derived from the contribution to capital by Modern Media shareholders of $400,000 in subordinated demand notes. We believe that these notes had very little value at this time because of the large senior debt and we also know that by contributing them the noteholders increased the tax basis of their stock. That increase in basis would appear to have been worth $0.25 on the dollar and it seems reasonable that unless the notes were not worth that much they would have been held and not contributed. For purposes of a settlement computation we have, therefore, assumed that the notes were worth $0.15 per dollar of their face amount or a total of $60,000. Thus, we arrive at an adjusted book, net worth of $125,000.

Since Mr. Unger received one-third of the 378,000 shares of M.T.P.S. outstanding, we have applied that fraction to $125,000 to arrive at the amount of value to be recognized in settlement, or $41,250. Reduced by his basis of $30,000, the cost of his Modern Media shares, the resulting income is $11,250. In partial recognition of the theory that there was a taxable event in 1968, we offer to accept 20% of this $11,250 as taxable income.

For clarity and convenience we have used round numbers in presenting this compromise offer and have not endeavored to make the actual tax computation, which involves, among other things, income averaging. If the concept of this offer has merit in your opinion, as we hope it will, we feel sure that the computation of tax and interest will not present a problem.

Respectfully submitted,

FROST & JACOBS,

WRS:HX

By

ARTHUR ANDERSEN & CO.

815 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20006

May 15, 1970

Mr. Sherman E. Unger
Watergate Hotel Apartments
2650 Virginia Avenue, N. W.
Washington, D. C. 20037

Dear Mr. Unger:

Enclosed are two copies of your amended Joint U. S. Individual Income Tax Return (Form 1040) for 1968. This amended return has been prepared in accordance with our discussion with you and Mr. Leonard Silverstein.

As you requested, we have inserted on the Amended Schedule D, Line 5, Gross Selling Prices (col. f) and Costs (col. h) necessary to arrive at the gains and loss reported on your original return. However, as you know, we have not verified these amounts in any way.

One copy of this return should be signed and dated by you and Mrs. Unger and filed as soon as possible with the Internal Revenue Service Center, 11601 Roosevelt Boulevard, Philadelphia, Pennsylvania 19155. A check made payable to Internal Revenue Service in the amount of $16,988.99 should accompany this return. A duplicate copy is enclosed for your files.

It should be noted that you will probably be assessed interest on the underpayment for the period April 15, 1969, through the date of payment. If and when such an assessment is made, we would be pleased to verify the computation.

We are returning herewith your papers and other data used in our work.

We would be pleased to answer any questions you may have concerning this return.

Very truly yours,

ARTHUR ANDERSEN & CO.

By John T. Schwieters
John T. Schwieters

cc: Leonard L. Silverstein, Esq.
Silverstein & Mullens
(with copy of return)

Enclosures

Form **1040** U.S. Individual Income Tax Return — U.S. Treasury Department, Internal Revenue Service — for the year January 1–December 31, 1968, or other taxable year beginning ...., 1968, ending ...., 19...... **1968**

Please print or type

First name and initial (if joint return, use first names and middle initials of both): SHERMAN E. & POLLY V.
Last name: UNGER
Your social security number: 286 | 20 | 7911
Home address (Number and street or rural route): WATERGATE HOTEL APARTMENTS 2650 VIRGINIA AVE., N.W.
Your occupation: ATTORNEY
City, town or post office, and State: WASHINGTON, D.C.
ZIP code: 20037
Spouse's social security number: 269 | 30 | 8806
Enter below name and address used on your return for 1967 (if same as above, write "Same"). If none filed, give reason. If changing from separate to joint or joint to separate returns, enter 1967 names and addresses.
ORIGINAL RETURN - NAME SAME; 7935 INDIAN HILL RD, CINCINNATI, OHIO
Spouse's occupation: HOUSEWIFE
Your present employer and address: U.S. DEPT OF HOUSING & URBAN DEVELOPMENT, WASH, D.C.

Your Filing Status—check only one:

1a ☐ Single
1b ☒ Married filing joint return (even if only one had income)
1c ☐ Married filing separately. If spouse is also filing a return, enter her (his) social security number in space provided above and give first name here ....
1d ☐ Unmarried Head of Household
1e ☐ Surviving widow(er) with dependent child

Your Exemptions

	Regular	65 or over	Blind	
2a Yourself . . .	☐	☐	☐	Enter number of boxes checked ▶
2b Spouse . . .	☐	☐	☐	

3a First names of your dependent children who lived with you .... Enter number ▶
3b Number of other dependents (from page 2, Part I, line 3)
4 Total exemptions claimed PER ORIGINAL RETURN ▶ 5

Income If joint return include all income of both husband and wife	5	Wages, salaries, tips, etc. If not shown on attached Forms W-2 attach explanation	5	[illegible]	[illegible] *
	6	Other income (from page 2, Part II, line 8)	6	90,830	00
	7	Total (add lines 5 and 6)	7	101,330	00
	8	Adjustments to income (from page 2, Part III, line 5)	8	2,500	00
	9	Total income ("adjusted gross income") (subtract line 8 from line 7)	9	98,830	00
Find tax from table —OR—	10	If you do not itemize deductions and line 9 is under $5,000, find tax in tables on pages 12–14 of instructions. Omit lines 11a, b, c, or d. Enter tax on line 12a.	10		
Figure tax using tax rate schedules	11a	If you itemize deductions, enter total from page 2, Part IV, line 17 If you do not itemize deductions, and line 9 is $5,000 or more enter the larger of: (1) 10 percent of line 9; OR (2) $200 ($100 if married and filing separate return) plus $100 for each exemption claimed on line 4, above. Deduction under (1) or (2) limited to $1,000 ($500 if married and filing separately).	11a	12,027	40
	11b	Subtract line 11a from line 9. Enter balance on this line	11b	86,802	60
	11c	Multiply total number of exemptions on line 4, above, by $600	11c	3,000	00
	11d	Subtract line 11c from line 11b. Enter balance on this line. (Figure your tax on this amount by using tax rate schedule on page 11 of instructions.) Enter tax on line 12a.	11d	83,802	60
Your Tax, Credits, and Payments	12a	Tax (Check if from: Tax Table ☐, Tax Rate Schedule ☐, Sch. D ☐, or Sch. G ☒)	12a	31,305	44
	12b	Tax surcharge. If line 12a is less than $734, find surcharge from tables on page 10 of instructions. If line 12a is $734 or more, multiply amount on line 12a by .075 and enter result. (If you claim retirement income credit, use Schedule B (Form 1040) to figure surcharge.)	12b	2,347	91
	12c	Total (add lines 12a and 12b)	12c	33,653	35
	13	Total credits (from page 2, Part V, line 4)	13		
	14a	Income tax (subtract line 13 from line 12c)	14a	33,653	35
	14b	Tax from recomputing prior year investment credit (attach statement)	14b		
	15	Self-employment tax (Schedule C-3 or F-1)	15		
	16	Total tax (add lines 14a, 14b, and 15)	16	33,653	35
	17	Total Federal income tax withheld (attach Forms W-2) 17		Make check or money order payable to Internal Revenue Service.	
	18	Excess F.I.C.A. tax withheld (two or more employers—see page 5 of instr.) 18			
	19	☐ Nonhighway Federal gasoline tax—Form 4136, ☐ Reg. Inv.—Form 2439 19			
	20	1968 Estimated tax payments (include 1967 overpayment allowed as a credit) 20			
	21	Total (add lines 17, 18, 19, and 20) TAX PD WITH ORIGINAL RETURN	21	16,654	36
Balance Due or Refund	22	If payments (line 21) are less than tax (line 16), enter Balance Due. Pay in full with this return	22	16,998	99
	23	If payments (line 21) are larger than tax (line 16), enter Overpayment	23		
	24	Amount of line 23 you wish credited to 1969 Estimated Tax	24		
	25	Subtract line 24 from 23. Apply to: ☐ U.S. Savings Bonds, with excess refunded or ☐ Refund only	25		

Please attach Copy B of Form W-2 here

Please attach Check or Money Order here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here ▷ .... Your signature .... Date
▷ .... Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

▷ ARTHUR ANDERSEN & Co — Signature of preparer other than taxpayer — 5-15-70 Date
815 Conn. Ave. N.W. WASH. D.C. 20006 — Address
By: John T. Schmitter

* WAGES, SALARIES, TIPS, ETC. INCREASED BY $1,000.00. SEE STATEMENT ATTACHED TO

Part I Exemptions Complete only for dependents claimed on line 3b, page 1 Form 1040—1972—Page 2

	(a) NAME (If more space is needed attach schedule)	(b) Relationship	(c) Months lived in your home. If born or died during year write "B" or "D"	(d) Did dependent have income of $750 or more?	(e) Amount YOU furnished for dependent's support. If 100% write "ALL"	(f) Amount furnished by OTHERS including dependent.
1					$	$ —
2						

3 Total number of dependents listed above. Enter here and on page 1, line 3b . . . . ▶

Part II Income from sources other than wages, etc.

1a Gross dividends and other distributions on stock (list payers and amounts—write (H), (W), (J), for stock held by husband, wife, or jointly)

Total line 1a . . . . ▶		
1b Exclusion (see instructions).		
1c Capital gain distributions (see page 5 of instructions).		
1d Nontaxable distribution. (see page 5 of instructions).		
1e Total (add lines 1b, 1c, and 1d)		
1f Taxable dividends (line 1a less line 1e—not less than zero) . . . . . . ▶	1,624	28 *

Interest (list payers and amounts below)

Earnings from savings and loan assoc. and credit unions.

Other interest (on bank deposits, bonds, tax refunds, etc.)

2 Total interest income . . . . ▶		
3 Pensions and annuities, rents and royalties, partnerships, estates or trusts, etc. (attach Sch. B) .	48,592	41 *
4 Business income or loss (attach Schedule C) . .		
5 Sale or exchange of property (attach Schedule D) .	36,988	69
6 Farm income or loss (attach Schedule F) . . .		

Miscellaneous income (state nature and source)

7 Total miscellaneous income . . . . . ▶	3,625	00 *
8 TOTAL (add lines 1f, 2, 3, 4, 5, 6, and 7). Enter here and on page 1, line 6 . . . . ▶	90,230	38

Part III Adjustments to income

1 "Sick pay" if included in line 5, page 1 (attach Form 2440 or other required statement) .		
2 Moving expenses (attach Form 3903) . .		
3 Employee business expense (attach Form 2106 or other statement)		
4 Payments by self-employed persons to retirement plans, etc. (attach Form 2950SE) .		
5 TOTAL ADJUSTMENTS (lines 1 through 4). Enter here and on page 1, line 8 . . . ▶	2,500	00 *

Part IV Itemized deductions—Use only if you do not use tax table or standard deduction.

Medical and dental expense (not compensated by insurance or otherwise)—Attach itemized list.

1 One-half of insurance premiums for medical care (but not more than $150) . . .		
2 Total cost of medicine and drugs . . .		
3 Enter 1% of line 9, page 1		
4 Subtract line 3 from line 2 (not less than zero)		
5 Other medical, dental expenses (include balance of insurance premiums for medical care not deductible on line 1) . . .		
6 Total (add lines 4 and 5)		
7 Enter 3% of line 9, page 1		
8 Subtract line 7 from line 6 (not less than zero) .		
9 Total (add lines 1 and 8) . . . . . ▶		

Contributions.—Cash—including checks, money orders, etc. (itemize)

10 Total cash contributions		
11 Other than cash (see instructions for required statement). Enter total of such items here .		
12 Carryover from prior years (see page 7 of instr.)		
13 Total contributions (add lines 10, 11, and 12—see instructions for limitation) ▶		
Taxes.—Real estate		
State and local gasoline		
General sales (see page 15 of instructions) .		
State and local income		
Personal property		
14 Total taxes . . . . ▶		
Interest expense.—Home Mortgage . . .		
Installment purchases		
Other (itemize)		
15 Total interest expense . . . . . . ▶		

Miscellaneous deductions.—(see page 8 of instructions)

16 Total miscellaneous . . . . ▶		
17 TOTAL DEDUCTIONS (add lines 9, 13, 14, 15, and 16). Enter here and on page 1, line 11a. ▶	12,027	40 *

Part V Credits

1 Retirement income credit (Schedule R) .		
2 Investment credit (Form 3468)		
3 Foreign tax credit (Form 1116)		
4 TOTAL CREDITS (for page 1, line 13) . ▶	16	37 *

EXPENSE ACCOUNTS—If you had an expense allowance or charged expenses to your employer, check here ☐ and see page 6 of instructions.

* PER ORIGINAL RETURN

AMENDED

SCHEDULE D
(Form 1040)
U.S. Treasury Department
Internal Revenue Service

Gains and Losses From Sales or Exchanges of Property

Attach this schedule to your income tax return, Form 1040

1968

Name as shown on page 1 of Form 1040: SHERMAN E. & POLLY V. UNGER

Social Security Number: 286 | 20 | 7911

Part I—CAPITAL ASSETS—Short-term capital gains and losses—assets held not more than 6 months

a. Kind of property, indicate security, real estate, or other (Specify)	b. Description (Examples: 100 sh. of "Z" Co., 2 story brick, etc.)	c. How acquired. Enter letter symbol (See Instr.)	d. Date acquired (mo., day, yr.)	e. Date sold (mo., day, yr.)	f. Gross sales price	g. Depreciation allowed (or allowable) since acquisition	h. Cost or other basis, cost of subsequent improvements (if not purchased, attach explanation) and expense of sale	i. Gain or loss (f plus g less h)
1								
SECURITY	50 SH AUTO SPRINK	A	2-1-68	4-30-68	1811.58		2793.31	⟨981.73⟩
RTS TO BUY 2/3 RDS OF STOCK OF MODERN TALKING PICTURE SERVICE			SEE STATEMENT		ATTACHED			36,556.85

2 Enter your share of net short-term gain (or loss) from partnerships and fiduciaries . . . . .

3 Enter unused short-term capital loss carryover from preceding taxable years (attach statement) . . . . .

4 Net short-term gain (or loss) from lines 1, 2, and 3 . . . . . 35,575.12

Long-term capital gains and losses—assets held more than 6 months (12 months or more for certain livestock)

5 Enter gain from Part II, line 3 . . . . .

a.	b.	c.	d.	e.	f.	g.	h.	i.
SECURITY	160 SH PLANET CORP	A	4-19-67	4-2-68	2284.65		2071.60	213.05
SECURITY	100 SH AMPEX	A	12-14-66	4-20-68	3122.62		2581.75	540.87
SECURITY	100 SH LIBERTY CORP	A	7-11-67	4-26-68	1502.75		1976.50	⟨473.75⟩
SECURITY	200 SH PLANET CORP	A	2-2-67	5-8-68	2857.00		1982.45	874.55
9/25	50 – Stokely Van	"	4-30-68	12-2-68	1838.15		2604.88	(774.73)
							1830.15	~~379.99~~
							774.73	

Total long-term gross sales price . . 9767.02

Adjustment to Cost MTPS will more than Balance

6a Enter your share of net long-term gain (or loss) from partnerships and fiduciaries . . . . .

6b Enter your share of net long-term gain from small business corporations (Subchapter S) . . . . .

7 Enter unused long-term capital loss carryover from preceding taxable years (attach statement) . . . . .

8 Capital gain dividends (see Form 1040 instructions, page 5) 1672.42

9 Net long-term gain (or loss) from lines 5, 6a, 6b, 7, and 8 . . . . . 2052.41. ~~2929.14~~

10 Combine the amounts shown on lines 4 and 9, and enter the net gain (or loss) here 38,402.26

11 If line 10 shows a GAIN—Enter 50% of line 9 or 50% of line 10, whichever is smaller. (Enter zero if there is a loss or no entry on line 9.) (See reverse side for computation of alternative tax.) . . . . . 1413.57 1026.20 387.37 — 1026.20 ~~1413.57~~

12 Subtract line 11 from line 10. Enter here and in Part IV, line 1, on reverse side 36,988.69

13 If line 10 shows a LOSS—Enter here and in Part IV, line 1, the smallest of the following: (a) the amount on line 10; (b) the amount on Form 1040, page 1, line 11b, computed without regard to capital gains or losses; or (c) $1,000 . . . .

Part II—GAIN FROM DISPOSITION OF DEPRECIABLE PROPERTY UNDER SECTIONS 1245 AND 1250—assets held more than 6 months (see instructions for definitions)

D

Where double headings appear, use the first heading for section 1245 and the second heading for section 1250.

a. Kind of property and how acquired (if necessary, attach statement of descriptive details not shown below—write 1245 or 1250 to indicate type of asset)	b. Date acquired (mo., day, yr.)	c. Date sold (mo., day, yr.)	d. Gross sales price	e. Cost or other basis, cost of subsequent improvements (if not purchased, attach explanation) and expense of sale
1				

f. Depreciation allowed (or allowable) since acquisition: f-1. Prior to January 1, 1962 —OR— Prior to January 1, 1964	f-2. After December 31, 1961 —OR— After December 31, 1963	g. Adjusted basis (e less sum of f-1 and f-2)	h. Total gain (d less g)	i. Ordinary gain (lesser of f-2 or h) —OR— (see instructions)	j. Other gain (h less i)

2 Total ordinary gain. Enter here and in Part IV, line 2, on reverse side . . . .

3 Total other gain. Enter here and in Part I, line 5; however, if the gains do not exceed the losses when this amount is combined with other gains and losses from section 1231 property enter the total of column j in Part III, line 1 . .

Part III—PROPERTY OTHER THAN CAPITAL ASSETS

a. Kind of property and how acquired (If necessary, attach statement of descriptive details not shown below)	b. Date acquired (mo., day, yr.)	c. Date sold (mo., day, yr.)	d. Gross sales price	e. Depreciation allowed (or allowable) since acquisition	f. Cost or other basis, cost of subsequent improvements (if not purchased, attach explanation) and expense of sale	g. Gain or loss (d plus e less f)
1 Enter gain from Part II, line 3						
2 Enter your share of partnership and fiduciary gain (or loss) from property other than capital assets						
3 Net gain (or loss) from lines 1 and 2. Enter here and in Part IV, line 3.						

Part IV—TOTAL GAINS OR LOSSES FROM SALE OR EXCHANGE OF PROPERTY

1 Net gain (or loss) from Part I, line 12 or 13	36,988.65
2 Total ordinary gain from Part II, line 2	
3 Net gain (or loss) from Part III, line 3	
4 Total net gain (or loss), combine lines 1, 2, and 3. Enter here and on Form 1040, page 2, Part II, line 5	36,988.65

COMPUTATION OF ALTERNATIVE TAX—It will usually be to your advantage to use the alternative tax if the net long-term capital gain exceeds the net short-term capital loss, or if there is a net long-term capital gain only, and you are filing (a) a separate return with taxable income exceeding $26,000, or (b) a joint return, or as a surviving husband or wife, with taxable income exceeding $52,000, or (c) as a head of household with taxable income exceeding $38,000.

1 Enter the amount from Form 1040, page 1, line 11d.	
2 Enter amount from Part I, line 11, on reverse side	
3 Subtract line 2 from line 1	
4 Enter tax on amount on line 3 (use applicable tax rate schedule on [illegible] Form 1040 instructions)	
5 Enter 50% of line 2	
6 Alternative tax (add lines 4 and 5). If smaller than the tax [illegible] the amount on Form 1040, page 1, line 11d, enter this alternative tax on Form 1040, page 1, line 12a, and check [illegible]	

INSTRUCTIONS (References are to the Internal Revenue Code)

GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY.—Report details in appropriate part or parts.

In column (c) of Part I and column (a) of Parts II and III use the following symbols to indicate how the property was acquired: "A" for purchase on the open market; "B" for exercise of stock option or through employee stock purchase plan; "C" for inheritance or gift; "D" for exchange involving carryover of prior asset basis; and "E" for other.

"Capital assets" defined.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business) but does NOT include—

(a) stock in trade or other property of a kind properly includible in his inventory if on hand at the close of the taxable year;

(b) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(c) property used in the trade or business of a character which is subject to the allowance for depreciation provided in section 167;

(d) real property used in the trade or business of the taxpayer;

(e) certain government obligations issued on or after March 1, 1941, at a discount, payable without interest and maturing at a fixed date not exceeding 1 year from date of issue;

(f) certain copyrights, literary, musical, or artistic compositions, etc.; or

(g) accounts and notes receivable acquired in the ordinary course of trade or business for services rendered or from the sale of property referred to in (a) or (b) above.

Special rules apply to dealers in securities for determining capital gain or ordinary loss on the sale or exchange of securities. Certain real property subdivided for sale may be treated as capital assets. Sections 1236 and 1237.

If the total distributions to which an employee is entitled under an employees' pension, bonus, or profit-sharing trust plan, which is exempt from tax under section 501(a), are paid to the employee in one taxable year, on account of the employee's separation from service, the aggregate amount of such distribution, to the extent it exceeds the amounts contributed by the employee, shall be treated as a long-term capital gain. (See section 402(a).)

Gain on sale of depreciable property between husband and wife or between a shareholder and a "controlled corporation" shall be treated as ordinary gain.

Gains and losses from transactions described in section 1231 shall be treated as gains and losses from the sale or exchange of capital assets held for more than 6 months if the total of these gains exceeds the total of these losses. If the total of these gains does not exceed the total of these losses, such gains and losses shall not be treated as gains and losses from the sale or exchange of capital assets. Thus, in the event of a net gain, all these transactions should be entered in Part I of Schedule D. In the event of a net loss, all these transactions should be entered in Part III of Schedule D, or in other applicable schedules on Form 1040.

Section 1231 deals with gains and losses arising from—

(a) sale, exchange, or involuntary conversion, of land (including in certain cases unharvested crops sold with the land) and depreciable property if they are used in the trade or business and held for more than 6 months.

(b) sale, exchange, or involuntary conversion of livestock held for draft, breeding, or dairy purposes (but not including poultry) and held for 1 year or more.

(c) the cutting of timber or the disposal of timber, coal, or domestic iron ore, to which section 631 applies, and

(d) the involuntary conversion of capital assets held more than 6 months.

See sections 1231 and 631 for specific conditions applicable.

Gain from disposition of depreciable property under sections 1245 and 1250—assets held more than 6 months (Part II).—*(Report any gain from such property held for 6 months or less in Part III.)* Except as provided below section 1245 property means depreciable (a) personal property (other than livestock) including intangible personal property; (b) tangible real property (except for buildings and their structural components) if used as an integral part of manufacturing, production, or extraction, or of furnishing transportation, communications, electrical energy, gas, water, or sewage disposal services, or used as a research or storage facility in connection with these activities; and (c) elevators and escalators.

Except as provided below section 1250 property means depreciable real property (other than section 1245 property).

See sections 1245(b) and 1250(d) for exceptions and limitations involving: (a) disposition by gift; (b) transfers at death; (c) certain tax-free transactions; (d) like kind exchanges, involuntary conversions; (e) sales or exchanges to effectuate FCC policies and exchanges to comply with S.E.C. orders; (f) property distributed by a partnership to a partner; and (g) disposition of principal residence (section 1250 only).

Column f of Part II.—In computing depreciation allowed or allowable for elevators or escalators, enter in column f-1 depreciation prior to July 1, 1963, and in column f-2 depreciation after June 30, 1963.

(Instructions continued on reverse side of duplicate)

Sherman E. and Polly V. Unger
SS. No. 286-20-7911
Amended 1968 Federal Income Tax Return

Schedule D

On or about June 10, 1968, Sherman E. Unger acquired the right to purchase all the outstanding stock of Modern Talking Picture Service, Inc. In acquiring this right, costs of $3,443.15 were incurred, consisting of $1,033.46 for travel, $563.45 for telephone, and $1,846.24 for related miscellaneous expenses. On June 11, 1968, such costs were reimbursed and two-thirds of such right were sold for $40,000. A short-term capital gain was thereby realized.

Proceeds of sale of 2/3 of right	$40,000.00
Less: Reimbursement costs	3,443.15
Short-term capital gain	$36,556.85

Form 1040, Line 5 - $1,000 Bonus

Wages, salaries, tips, etc. have been increased by $1,000 from the amount shown on the return as filed to reflect amount paid to Sherman E. Unger on December 6, 1968.

SCHEDULE G
(Form 1040)
U.S. Treasury Department
Internal Revenue Service

Income Averaging

Attach this schedule to your income tax return, Form 1040

1968

Name as shown on page 1 of Form 1040: SHERMAN E. & POLLY V. UNGER

Social security number: 286 | 20 | 7911

PART I.—TAXABLE INCOME AND ADJUSTMENTS

	(a) Computation year 1968	(b) 1st preceding base period year 1967	(c) 2d preceding base period year 1966	(d) 3d preceding base period year 1965	(e) 4th preceding base period year 1964
1 Taxable income (see instruction 1)	83,802.60	32,299.53	25,488.41	20,744.52	16,254.29
2 Income earned outside of the United States or within U.S. possessions and excluded under sections 911 and 931					
3 Capital gain net income from Schedule D (Form 1040), line 11 (except 1964 which is line 10a) or Capital gain dividends reported on Form 1040, page 2, Part II, line 7	1413.57	7,155.35	1,154.75	491.60	339.42
4 Net income from gifts, etc., received this year or any base period year. (If $3,000 or less in 1968 do not enter in any year.)					
5 Net income from wagering and other items described in instruction 5					
6 Line 1 plus line 2, less lines 3, 4, and 5	82,389.03	25,144.18	24,333.66	20,252.92	15,914.87
7 Adjusted taxable income or base period income. Enter amount from line 6, or "Zero" if line 6 is less than zero	82,389.03	25,144.18	24,333.66	20,252.92	15,914.27

PART II.—COMPUTATION OF AVERAGABLE INCOME

1 Adjusted taxable income (line 7, column (a), Part I)		82,389.03
2 33⅓% of the sum of line 7, columns (b), (c), (d), and (e), Part I		28,548.54
3 (a) 25% of the sum of line 3, columns (b), (c), (d), and (e), Part I. NOTE: If an amount less than zero appears in line 6, Part I, see instruction 3(a) under Part II	2,285.27	
(b) Amount from line 3, column (a), Part I	1,413.57	
(c) If line 3(a) is more than line 3(b), enter difference—if not, make no entry		871.71
4 Averagable income (line 1 less lines 2 and 3(c))		52,968.78

COMPLETE THE REMAINING PARTS OF THIS FORM ONLY IF LINE 4 IS MORE THAN $3,000. IF $3,000 OR LESS, YOU DO NOT QUALIFY FOR INCOME AVERAGING. DO NOT FILL IN REST OF FORM.

PART III.—SEGMENTS OF INCOME UNDER AVERAGING

1 Amount from line 2, Part II	28,548.54
2 Amount from line 3(a), Part II	2,285.28
3 20% of line 4, Part II	10,593.76
4 Sum of lines 4 and 5, column (a), Part I, less any income subject to a penalty under section 72(m)(5) which was included in line 5, Part I	
5 If line 3(b) is more than line 3(a), Part II, enter difference—if not, make no entry	
6 Total (sum of lines 1 through 5)	41,427.58

PART IV.—COMPUTATION OF TAX

1 Tax on the amount on line 6, Part III			12,825.24
2 Sum of lines 1, 2, and 3, Part III	41,427.58		
3 Tax on amount on line 2		12,825.24	
4 Sum of lines 1 and 2, Part III	30,833.82		
5 Tax on amount on line 4		8,205.19	
6 Difference (line 3 less line 5)		4,620.05	
7 The amount of line 6 multiplied by 4			18,480.20
8 Total (add lines 1 and 7)			31,305.44
9 Tax on income subject to the penalty under section 72(m)(5) which was included in line 5, Part I			
10 Tax (add lines 8 and 9). Enter here and, if you are not using the alternative tax computation in Part V, on Form 1040, page 1, line 12a, and check Sch. G box			31,305.44

Schedule G (Form 1040) 1968 Page 6

PART V.—COMPUTATION OF ALTERNATIVE TAX

1 Amount from line 10, Part IV			31,305.44
2 Amount from line 5, Part IV		8205.19	
3 (a) Amount from line 2, Part II	28,542.54		
(b) Amount from line 3(c), Part II	871.71		
(c) Sum of lines 3(a) and 3(b)	29,420.25		
4 Tax on amount on line 3(c)		7653.90	
5 Difference (line 2 less line 4)		551.29	
6 Amount from line 1, Part IV		12,825.24	
7 Sum of lines 1, 2, 3, and 4, Part III	41,427.58		
8 Tax on amount on line 7		12,825.24	
9 Difference (line 6 less line 8)		—	
10 Sum of lines 5 and 9		551.29	
11 Amount from line 3, column (a), Part I	1413.57		
12 50% of line 11		706.79	
13 If line 10 is more than line 12, enter difference—otherwise alternative tax does not apply			—
14 Alternative tax (line 1 less line 13). Enter here and on Form 1040, page 1, line 12a, and check Sch. G box			

Use this space for additional information such as determining base period income in accordance with General Instruction C or itemizing of line 5, Part I, etc.

DOES NOT QUALIFY FOR
ALTERNATIVE TAX

Form **1040** **U.S. Individual Income Tax Return** U.S. Treasury Department, Internal Revenue Service for the year January 1–December 31, 1968, **1968**

or other taxable year beginning .... 1968, ending .... 19....

Please print or type

Please use this form. Correct name, etc., if necessary. Enter social security number(s) at right only if incorrect or not shown on label.

Y 286-20-7911 269-30-8806 n031
SHERMAN E & POLLY V UNGER
7935 INDIAN HILL ROAD
CINCINNATI OHIO 45243 ...

Your social security number 286 | 20 | 7911

Your occupation Lawyer

Spouse's social security number 269 | 30 | 8806

Spouse's occupation Housewife

Enter below name and address used on your return for 1967 (if same as above, write "Same"). If none filed, give reason. If changing from separate to joint or joint to separate returns, enter 1967 names and addresses.
Same

Your present employer and address U.S. Dept of Housing & Urban Dev. 451 7th St Washington D.C.

Your Filing Status—check only one:

1a ☐ Single
1b ☒ Married filing joint return (even if only one had income)
1c ☐ Married filing separately. If spouse is also filing a return, enter her (his) social security number in space provided above and give first name here ____
1d ☐ Unmarried Head of Household
1e ☐ Surviving widow(er) with dependent child

Your Exemptions

	Regular	65 or over	Blind	
2a Yourself . . .	☒	☐	☐	Enter number of boxes checked ▶ 2
2b Spouse . . .	☒	☐	☐	

3a First names of your dependent children who lived with you Cathleen Peter Enter number ▶ 2
3b Number of other dependents (from page 2, Part I, line 3) 1
4 Total exemptions claimed . . . . ▶ 5

Income If joint return includes all income of both husband and wife	5 Wages, salaries, tips, etc. If not shown on attached Forms W–2 attach explanation	5	9,499	62
	6 Other income (from page 2, Part II, line 8)	6	54,769	40
	7 Total (add lines 5 and 6)	7	64,269	02
	8 Adjustments to income (from page 2, Part III, line 5)	8	2,500	00
	9 Total income ("adjusted gross income") (subtract line 8 from line 7)	9	61,769	02
Find tax from table —OR—	10 If you do not itemize deductions and line 9 is under $5,000, find tax in tables on pages 12–14 of instructions. Omit lines 11a, b, c, or d. Enter tax on line 12a.	10	▨	▨
Figure tax using tax rate schedules	11a If you itemize deductions, enter total from page 2, Part IV, line 17 If you do not itemize deductions, and line 9 is $5,000 or more enter the larger of: (1) 10 percent of line 9; OR (2) $200 ($100 if married and filing separate return) plus $100 for each exemption claimed on line 4, above. Deduction under (1) or (2) limited to $1,000 ($500 if married and filing separately).	11a	12,027	40
	11b Subtract line 11a from line 9. Enter balance on this line	11b	49,736	62
	11c Multiply total number of exemptions on line 4, above, by $600	11c	3,000	00
	11d Subtract line 11c from line 11b. Enter balance on this line. (Figure your tax on this amount by using tax rate schedule on page 11 of instructions.) Enter tax on line 12a.	11d	46,736	62
Your Tax, Credits, and Payments	12a Tax (Check if from: Tax Table ☐, Tax Rate Schedule ☒, Sch. D ☐, or Sch. G ☐)	12a	15,428	31
	12b Tax surcharge. If line 12a is less than $734, find surcharge from tables on page 10 of instructions. If line 12a is $734 or more, multiply amount on line 12a by .075 and enter result. (If you claim retirement income credit, use Schedule B (Form 1040) to figure surcharge.)	12b	1,152	12
	12c Total (add lines 12a and 12b)	12c	16,680	43
	13 Total credits (from page 2, Part V, line 4)	13	16	07
	14a Income tax (subtract line 13 from line 12c)	14a	16,669	36
	14b Tax from recomputing prior year investment credit (attach statement)	14b		
	15 Self-employment tax (Schedule C–3 or F–1)	15	0	00
	16 Total tax (add lines 14a, 14b, and 15)	16	16,669	36

17 Total Federal income tax withheld (attach Forms W–2)	17	2,558	00
18 Excess F.I.C.A. tax withheld (two or more employers—see page 5 of instr.)	18	57	78
19 ☐ Nonhighway Federal gasoline tax—Form 4136, ☐ Reg. Inv.—Form 2439	19		
20 1968 Estimated tax payments (include 1967 overpayment allowed as a credit)	20	13,600	00

Make check or money order payable to Internal Revenue Service.

	21 Total (add lines 17, 18, 19, and 20)	21	16215	78
Balance Due or Refund	22 If payments (line 21) are less than tax (line 16), enter Balance Due. Pay in full with this return	22	453	58
	23 If payments (line 21) are larger than tax (line 16), enter Overpayment	23		
	24 Amount of line 23 you wish credited to 1969 Estimated Tax	24		
	25 Subtract line 24 from 23. Apply to: ☐ U.S. Savings Bonds, with excess refunded or ☐ Refund only	25		

Please attach Copy B of Form W–2 here

Please attach Check or Money Order here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here ▷ Sherman Unger 4/15/69
Your signature Date
▷ Polly V. Unger
Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

▷ ____
Signature of preparer other than taxpayer Date
____
Address

Exemptions Complete only for dependents claimed on line 3b, page 1

(a) NAME (If more space is needed attach schedule)	(b) Relationship	(c) Months lived in your home. If born or died during year write "B" or "D"	(d) Did dependent have income of $750 or more?	(e) Amount YOU furnished for dependent's support. If 100% write "ALL"	(f) Amount furnished by OTHERS including dependent.
1 [illegible]	[illegible]		no	$ 1800.00	$ 0
2					

3 Total number of dependents listed above. Enter here and on page 1, line 3b ▶ 1

Income from sources other than wages, etc.

1a Gross dividends and other distributions on stock (list payers and amounts—write (H), (W), (J), for stock held by husband, wife, or jointly)

(J) [illegible]	1,260.00
(H) Baxter Labs	68.00
(W) [illegible]	30.00
(W) Automatic Sprinkler	1.00
(H) Liberty Life	35.00
(W) Dreyfus Fund	2,102.70

Total line 1a ▶			3496	70
1b Exclusion (see instructions).	200	00		
1c Capital gain distributions (see page 5 of instructions).	1672	42		
1d Nontaxable distributions (see page 5 of instructions).				
1e Total (add lines 1b, 1c, and 1d)			1872	42
1f Taxable dividends (line 1a less line 1e—not less than zero) ▶			1624	28

Interest (list payers and amounts below)

Earnings from savings and loan assoc. and credit unions.

Other interest (on bank deposits, bonds, tax refunds, etc.)

2 Total interest income ▶	-0-	
3 Pensions and annuities, rents and royalties, partnerships, estates or trusts, etc. (attach Sch. E)	48592	41
4 Business income or loss (attach Schedule C)		
5 Sale or exchange of property (attach Schedule D)	922	71
6 Farm income or loss (attach Schedule F)		

Miscellaneous income (state nature and source)

[illegible]	625.00
[illegible]	3000.00

7 Total miscellaneous income ▶	3,625	00
8 TOTAL (add lines 1f, 2, 3, 4, 5, 6, and 7). Enter here and on page 1, line 6 ▶	54764	40

Adjustments to income

1 "Sick pay" if included in line 5, page 1 (attach Form 2440 or other required statement)		
2 Moving expenses (attach Form 3903)		
3 Employee business expense (attach Form 2106 or other statement)		
4 Payments by self-employed persons to retirement plans, etc. (attach Form 2950SE)	2500	00
5 TOTAL ADJUSTMENTS (lines 1 through 4). Enter here and on page 1, line 8 ▶	2500	00

Itemized deductions—Use only if you do not use tax table or standard deduction.

Medical and dental expense (not compensated by insurance or otherwise)—Attach itemized list.

1 One-half of insurance premiums for medical care (but not more than $150)		
2 Total cost of medicine and drugs		
3 Enter 1% of line 9, page 1		
4 Subtract line 3 from line 2 (not less than zero)		
5 Other medical, dental expenses (include balance of insurance premiums for medical care not deductible on line 1)		
6 Total (add lines 4 and 5)		
7 Enter 3% of line 9, page 1		
8 Subtract line 7 from line 6 (not less than zero)		
9 Total (add lines 1 and 8) ▶		

Contributions.—Cash—including checks, money orders, etc. (Itemize) Cincinnati Country Day School 1,515.12, [illegible] Fine Arts 40.00, UNICEF 10.00, [illegible] 50.00, Cincinnati Zoo 10.00, [illegible] Players 360.00, United Appeal 75.00

10 Total cash contributions	185	12
11 Other than cash (see instructions for required statement). Enter total of such items here	1878	00
12 Carryover from prior years (see page 7 of instr.)	2063	17
13 Total contributions (add lines 10, 11, and 12—see instructions for limitation) ▶	-	
Taxes.—Real estate	817	90
State and local gasoline	223	00
General sales (see page 15 of instructions)	465	00
State and local income	-	
Personal property		
14 Total taxes ▶	1505	90

Interest expense.—Home Mortgage	1833.90
Installment purchases	
Other (Itemize) M.L.P.F.&S. ✓	326.98
Note Provident Bank	788.88
Note 1st Nat. Bank	27.30

15 Total interest expense ▶	2977	06

Miscellaneous deductions.—(see page 8 of instructions)

16 Total miscellaneous ▶	5481	3[illegible]
17 TOTAL DEDUCTIONS (add lines 9, 13, 14, 15, and 16). Enter here and on page 1, line 11a. ▶	12027	[illegible]

Credits

1 Retirement income credit (Schedule B)		
2 Investment credit (Form 3468)	16	5[illegible]
3 Foreign tax credit (Form 1116)		
4 TOTAL CREDITS (for page 1, line 13) ▶		

EXPENSE ACCOUNTS—If you had an expense allowance or charged expenses to your employer, check here ☐ and see page 6 of instructions

U.S. GOVERNMENT PRINTING OFFICE [illegible]

SCHEDULE D
(Form 1040)
U.S. Treasury Department
Internal Revenue Service

Gains and Losses From Sales or Exchanges of Property

Attach this schedule to your income tax return, Form 1040

1968

Name as shown on page 1 of Form 1040: SHERMAN & POLLY UNGER

Social Security Number: 286 | 20 | 7411

Part I—CAPITAL ASSETS—Short-term capital gains and losses—assets held not more than 6 months

a. Kind of property. Indicate security, real estate, or other (Specify)	b. Description (Examples: 100 sh. of "Z" Co., 2 story brick, etc.)	c. How acquired. Enter letter symbol (See instr.)	d. Date acquired (mo., day, yr.)	e. Date sold (mo., day, yr.)	f. Gross sales price	g. Depreciation allowed (or allowable) since acquisition	h. Cost or other basis, cost of subsequent improvements (if not purchased, attach explanation) and expense of sale	i. Gain or loss (f plus g less h)
1 Security	50 Sh. [illegible]	A	2/1/68	4/30/68	1811.58		2793.31	(981.73)

2 Enter your share of net short-term gain (or loss) from partnerships and fiduciaries

3 Enter unused short-term capital loss carryover from preceding taxable years (attach statement)

4 Net short-term gain (or loss) from lines 1, 2, and 3 — (981.73)

Long-term capital gains and losses—assets held more than 6 months (12 months or more for certain livestock)

5 Enter gain from Part II, line 3

a.	b.	c.	d.	e.	f.	g.	h.	i.
Security	162 Sh Plant Ind	A	4/19/67	9/2/68	2284.65		2284.65	213.05
"	100 [illegible]	A	12/14/66	4/20/68	2581.75		3122.62	540.87
"	100 [illegible] Cab	A	7/11/67	4/26/68	1976.50		1502.75	(473.75)
"	200 Pleasant	A	2/2/67	5/8/68	1983.55		2857.00	874.55
	50 Stokely Van	A	4/30/68	10/2/68	1830.15		2604.88	(774.73)
								379.99

Total long-term gross sales price . .

6a Enter your share of net long-term gain (or loss) from partnerships and fiduciaries

6b Enter your share of net long-term gain from small business corporations (Subchapter S)

7 Enter unused long-term capital loss carryover from preceding taxable years (attach statement) — 1,672.42

8 Capital gain dividends (see Form 1040 instructions, page 5) 2827.19 774.73 2053.71 — ~~2827.19~~

9 Net long-term gain (or loss) from lines 5, 6a, 6b, 7, and 8 2053.36 1070.68 — 1 845.41

10 Combine the amounts shown on lines 4 and 9, and enter the net gain (or loss) here

11 If line 10 shows a GAIN—Enter 50% of line 9 or 50% of line 10, whichever is smaller. (Enter zero if there is a loss or no entry on line 9.) (See reverse side for computation of alternative tax.) 535.34 — ~~922.70~~ ~~922.71~~

12 Subtract line 11 from line 10. Enter here and in Part IV, line 1, on reverse side — 535.34

13 If line 10 shows a LOSS—Enter here and in Part IV, line 1, the smallest of the following: (a) the amount on line 10; (b) the amount on Form 1040, page 1, line 11b, computed without regard to capital gains or losses; or (c) $1,000 — 317 37

Part II—GAIN FROM DISPOSITION OF DEPRECIABLE PROPERTY UNDER SECTIONS 1245 AND 1250—assets held more than 6 months (see instructions for definitions)

D

Where double headings appear, use the first heading for section 1245 and the second heading for section 1250.

a. Kind of property and how acquired (If necessary, attach statement of descriptive details not shown below—write 1245 or 1250 to indicate type of asset)	b. Date acquired (mo., day, yr.)	c. Date sold (mo., day, yr.)	d. Gross sales price	e. Cost or other basis, cost of subsequent improvements (if not purchased, attach explanation) and expense of sale
1				

f. Depreciation allowed (or allowable) since acquisition: f-1. Prior to January 1, 1962 —OR— Prior to January 1, 1964	f-2. After December 31, 1961 —OR— After December 31, 1963	g. Adjusted basis (e less sum of f-1 and f-2)	h. Total gain (d less g)	i. Ordinary gain (lesser of f-2 or h) —OR— (see instructions)	j. Other gain (h less i)

2 Total ordinary gain. Enter here and in Part IV, line 2, on reverse side

3 Total other gain. Enter here and in Part I, line 5; however, if the gains do not exceed the losses when this amount is combined with other gains and losses from section 1231 property enter the total of column j in Part III, line 1

Part III—PROPERTY OTHER THAN CAPITAL ASSETS

a. Kind of property and how acquired (If necessary, attach statement of descriptive details not shown below)	b. Date acquired (mo., day, yr.)	c. Date sold (mo., day, yr.)	d. Gross sales price	e. Depreciation allowed (or allowable) since acquisition	f. Cost or other basis, cost of subsequent improvements (if not purchased, attach explanation) and expense of sale	g. Gain or loss (d plus e less f)
1 Enter gain from Part II, line 3						
2 Enter your share of partnership and fiduciary gain (or loss) from property other than capital assets						
3 Net gain (or loss) from lines 1 and 2. Enter here and in Part IV, line 3						

Part IV—TOTAL GAINS OR LOSSES FROM SALE OR EXCHANGE OF PROPERTY

1 Net gain (or loss) from Part I, line 12 or 13	922.71
2 Total ordinary gain from Part II, line 2	
3 Net gain (or loss) from Part III, line 3	
4 Total net gain (or loss), combine lines 1, 2, and 3. Enter here and on Form 1040, page 2, Part II, line 5	922.71

COMPUTATION OF ALTERNATIVE TAX—It will usually be to your advantage to use the alternative tax if the net long-term capital gain exceeds the net short-term capital loss, or if there is a net long-term capital gain only, and you are filing (a) a separate return with taxable income exceeding $26,000, or (b) a joint return, or as a surviving husband or wife, with taxable income exceeding $52,000, or (c) as a head of household with taxable income exceeding $38,000.

1 Enter the amount from Form 1040, page 1, line 11d	
2 Enter amount from Part I, line 11, on reverse side	
3 Subtract line 2 from line 1	
4 Enter tax on amount on line 3 (use applicable tax rate schedule on page 11 of Form 1040 instructions)	
5 Enter 50% of line 2	
6 Alternative tax (add lines 4 and 5). If smaller than the tax figured on the amount on Form 1040, page 1, line 11d, enter this alternative tax on Form 1040, page 1, line 12a, and check Sch. D box	

INSTRUCTIONS (Continued from reverse side of original)

Column i of Part II, section 1250 property only.—If held for more than 6 months, but not more than 1 year, enter the smaller of (1) column h, or (2) column f-2.

If held for more than 1 year, enter the result of multiplying the smaller of (1) column h, or
(2) column f-2 less the amount of depreciation computed for the same period using the straight line method,
by the percentage obtained by subtracting from 100%, one percentage point for each full month held in excess of 20 months.

Where substantial improvements have been made within the preceding 10 years, see section 1250(f).

Basis.—In determining gain or loss use cost, except as specially provided. The basis of property acquired by gift after December 31, 1920, is the cost or other basis to the donor in the event of gain, but, in the event of loss, it is the lower of either such donor's basis or the fair market value on date of gift. If a gift tax was paid with respect to property received by gift, see section 1015(d). Generally, the basis of property acquired by inheritance is the fair market value at the date of death. For special cases involving property acquired from a decedent, see section 1014.

Installment sales.—If you sold personal property for more than $1,000 or real property regardless of amount, you may be eligible to report any gain under the installment plan if (1) there is no payment in the year of sale, or (2) the payments in the year of sale do not exceed 30 percent of the selling price. The election must be made in the year of sale even though no payment was received in that year. See section 453.

For treatment of a portion of payments as "unstated interest" on deferred payment sales, see section 483.

Sale of personal residence.—Tax on a portion or all of the gain from the sale of your principal residence may be deferred if:

(a) within 1 year after (or before) the sale, you purchase another residence and use it as your principal residence; or
(b) within 1 year after (or before) the sale, you begin construction of a new residence and use it as your principal residence not later than 18 months after the sale.

If you sold property for $20,000 or less on or after your 65th birthday which was owned and used by you as your principal residence for at least 5 of the last 8 years any gain on the sale need not be included in income. If the property was sold for more than $20,000 part of the gain must be taken into income. Publication 523, Tax Information on Selling Your Home, is available at the District Director's office.

Nonbusiness debts.—If a debt, such as a personal loan, becomes totally worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. Enter such loss in column (i) and describe in column (b), Part I. This does not apply to: (a) a debt evidenced by a corporate security with interest coupons or in registered form and (b) a debt acquired in your trade or business.

Limitation on allowable capital losses.—If line 10, Part I, shows a net loss, the loss shall be allowed as a deduction, only to the extent of the smaller of (1) line 11b (or line 9 if tax table is used), page 1, Form 1040 computed without capital gains (losses), or (2) $1,000. The excess of such allowable loss over the lesser of items (1) and (2) above is called "capital loss carryover." Any such carryover loss may be carried forward indefinitely. Capital losses retain their character as either short-term or long-term when carried over to the succeeding year. To the extent the net capital losses are deducted from ordinary income, the net short-term capital loss must be considered as deducted first.

Losses in transactions between certain persons.—No deduction is allowable for losses from sales or exchanges of property directly or indirectly between (a) members of a family, (b) a corporation and an individual (or a fiduciary) owning more than 50 percent of the corporation's stock (liquidations excepted), (c) a grantor and fiduciary of any trust, (d) a fiduciary and a beneficiary of the same trust, (e) a fiduciary and a fiduciary or beneficiary of another trust created by the same grantor, or (f) an individual and a tax-exempt organization controlled by the individual or his family. Partners and partnerships see section 707(b).

Long-term capital gains from regulated investment companies.—Include in income as a long-term capital gain the amount you are notified on Form 2439 which constitutes your share of the undistributed capital gains of a regulated investment company. Include the tax paid by the company as shown on the Form 2439 with the amount claimed on Form 1040, page 1, line 19. Add to the basis of your stock, the excess of the amount included in income over the credit.

Losses on small business stock.—If you had a loss on section 1244 stock which would (but for that section) be treated as a loss from the sale or exchange of a capital asset, it shall be treated as a loss from the sale or exchange of an asset which is not a capital asset to the extent provided in that section.

SCHEDULE B
(Form 1040)
U.S. Treasury Department
Internal Revenue Service

Supplemental Schedule of Income and Retirement Income Credit

(From pensions and annuities, rents and royalties, partnerships, and estates or trusts)

Attach this schedule to your income tax return, Form 1040

1966

Name as shown on page 1 of Form 1040: SHERMAN & POLLY UNGER

Social Security Number: 286 | 20 | 7911

Part I.—PENSION AND ANNUITY INCOME

Name of payer .... Did your employer contribute part of the cost and is your contribution recoverable (or was recovered) tax-free within 3 years? ☐ Yes ☐ No

If "Yes" enter the amount you contributed $............ and amount recovered tax-free in past years $............

	Amount
1 Amount received this year	
2 Amount excludable. Enter zero if you did not contribute to the cost	
3 Taxable portion (excess of line 1 over line 2)	

Part II.—RENT AND ROYALTY INCOME

1. Kind and location of property	2. Total amount of rents	3. Total amount of royalties	4. Depreciation (explain in Part IV) or depletion (attach computation)	5. Repairs (attach itemized list)	6. Other expenses (attach itemized list)
1 Totals					

2 Net income (or loss) from rents and royalties (column 2 plus column 3 less columns 4, 5, and 6)

Part III.—INCOME OR LOSSES FROM PARTNERSHIPS, ESTATES OR TRUSTS, AND SMALL BUSINESS CORPORATIONS

(a) Name and address	(b) Check applicable box: Partnership	Estate or Trust	Small Bus. Corp.	(c) Employer identification number	(d) Income or loss
Frost & Jacobs, 2300 Central Trust Tower, Cincinnati, O	✓				48 592.41

1 Income (or loss). Total of column (d) 48 592.41

TOTAL OF PARTS I, II, AND III (Enter here and on Form 1040, page 2, Part II, line 3) 48 592.41

Part IV.—SCHEDULE FOR DEPRECIATION CLAIMED IN PART II ABOVE

—Where double headings appear use the first heading for depreciation under Revenue Procedures 62-21 and 65-13 and the second heading for other authorized practices.

1. Group and guideline class —OR— Description of property	2. Cost or other basis at beginning of year —OR— Cost or other basis	3. Asset additions in year (amount) —OR— Date acquired	4. Asset retirements in year (amount) (applicable only to Rev. Proc. 62-21)	5. Depreciation allowed or allowable in prior years	6. Method of computing depreciation	7. Class life —OR— Rate (%) or life	8. Depreciation for this year
1 Total additional first-year depreciation (do not include in items below)							
Total cost or other basis							

2 Total depreciation (Enter here and in Part II, column 4 above)

SUMMARY OF DEPRECIATION

	Straight line	Declining balance	Sum of the years-digits	Units of production	Additional first year (section 179)	Other (specify)	Total
1 Under Rev. Proc's. 62-21 and 65-13							
2 Other							

Schedule E (Form 1040) 1969 Page

Part V.—RETIREMENT INCOME CREDIT—A.—General Rule

If separate return, use column B only. If joint return, use column A for wife and column B for husband→	A	B
Did you receive earned income in excess of $600 in each of any 10 calendar years before 1968? (Widows or widowers see instructions, page B–3)	☐ Yes ☐ No	☐ Yes ☐ No
If answer above is "Yes" in either column, furnish all information below in that column.		
1 Retirement income for taxable year:		
(a) For taxpayers under 65 years of age: Enter only income received from pensions and annuities under public retirement systems (e.g. Fed., State Govts., etc.) included on Form 1040, page 1, line 9		
(b) For taxpayers 65 years of age or older: Enter total of pensions and annuities, interest, and dividends included on Form 1040, page 1, line 9, and gross rents from Part II, column 2 of this schedule		
2 Maximum amount of retirement income for credit computation	$1,524 00	$1,524 00
3 Deduct:		
(a) Amounts received as pensions or annuities under the Social Security Act, the Railroad Retirement Acts, and certain other exclusions from gross income		
(b) Earned income received (Does not apply to persons 72 years of age or over):		
(1) Taxpayers under 62 years of age, enter amount in excess of $900		
(2) Taxpayers 62 or over but under 72, enter amount determined as follows: If $1,200 or less, enter zero; If over $1,200 but not over $1,700, enter ½ of amount over $1,200; or if over $1,700, enter excess over $1,450		
4 Total of lines 3(a) and 3(b)		
5 Balance (subtract line 4 from line 2)		
6 Line 5 or line 1, whichever is smaller		

7 (a) Total (add amounts on line 6, columns A and B)

If line 7(a) is less than $2,286 and this is a joint return and both husband and wife are age 65 or over, complete the Alternative Computation in B below which may result in a larger credit.

(b) Amount from line 7 of part B below, if applicable

8 Tentative credit. Enter 15% of line 7(a) or 15% of line 7(b), whichever is greater

9 Amount of tax shown on Form 1040, page 1, line 12a

10 Credit claimed for foreign taxes or tax-free covenant bonds

11 Subtract line 10 from line 9

12 Enter here the amount on line 11 or line 8, whichever is smaller

COMPUTATION OF SURCHARGE

13 Subtract line 12 from line 9

14 If line 13 is less than $734, find surcharge from tables on page 10 of instructions. If line 13 is $734 or more multiply amount on line 13 by .075 and enter result. Enter here and on Form 1040, page 1, line 12b

LIMITATION ON RETIREMENT INCOME CREDIT

15 Credit. Enter here and on Form 1040, page 2, Part V, line 1, the sum of lines 12 and 14 or the amount shown on line 8, whichever is smaller

B.—Alternative Computation (after completing lines 1 through 7(a) above)

This method available if:
a. You are married and filing a joint return;
b. Both husband and wife are 65 or over, AND
c. Either one, or both received earned income in excess of $600 in each of any 10 calendar years before 1968.

Furnish the information called for below for both husband and wife even if only one answered "Yes" in column A or B above.

1 Retirement income of both husband and wife from pensions and annuities, interest, and dividends included on Form 1040, page 1, line 9, and gross rents from Part II, column 2 of this schedule

2 Maximum amount of retirement income for credit computation $2,286 00

	A—WIFE	B—HUSBAND
3 Deduct:		
(a) Amounts received as pensions or annuities under the Social Security Act, the Railroad Retirement Acts, and certain other exclusions from gross income		
(b) Earned income received (Does not apply to persons 72 or over): If $1,200 or less, enter zero; If over $1,200 but not over $1,700 enter ½ of amount over $1,200; or If over $1,700, enter excess over $1,450		
4 Total of lines 3(a) and 3(b)		

5 Total (add amounts on line 4, columns A and B)

6 Balance (subtract line 5 from line 2)

7 Enter here and on line 7(b) of part A above, the amount on line 6 or line 1, whichever is smaller

INSTRUCTIONS FOR SOCIAL SECURITY SELF-EMPLOYMENT TAX

In general, every individual deriving self-employment income from a trade or business or from a partnership is subject to the self-employment tax. This tax must be paid regardless of age and even though the individual is receiving social security benefits.

If you have conscientious objections to social security insurance because you adhere to the established teachings of a religious sect of which you are a member, you may file Form 4029, Application for Exemption from Tax on Self-Employment Income and Waiver of Benefits, to obtain exemption from self-employment tax. If you have filed Form 4029, do not file Schedule C-3; however, write "Exempt—Form 4029" to left of entry space on Form 1040, page 1, line 15.

Ministers, members of religious orders, and Christian Science practitioners.—Duly ordained, commissioned, or licensed ministers of churches, members of religious orders (who have not taken a vow of poverty), and Christian Science practitioners are now subject to self-employment tax, but may under certain conditions request to exempt their income from service as a minister, member or practitioner by filing Form 4361, Application for Exemption from Self-Employment Tax for use by Ministers, Members of Religious Orders and Christian Science Practitioners. Copies may be obtained from the District Director. The instructions on the form set out the provisions of the law which permit ministers, etc. to file this form to request exemption from self-employment tax. (If you previously filed an effective waiver certificate Form 2031, you may not now file for an exemption.) See **Publication 484**, Social Security for Clergymen, available at the District Director's office.

Ministers and members of religious orders must include in their earnings from self-employment (but not for income tax) the rental value of a parsonage or allowance for the rental value of the parsonage and the value of meals and lodging furnished them for the convenience of their employers.

Fee basis State or local government employees.—Fees received for functions and services performed by employees (including public officers who in such capacity are employees) are subject to self-employment tax if such functions and services are performed in positions which are: (1) compensated solely on a fee basis; and (2) not covered under a Federal-State social security coverage agreement. However, if an individual occupied such a position in 1968, he may irrevocably elect to exempt such fees from self-employment tax by filing Form 4415, Election to Exempt from Self-Employment Coverage Fees Received by Certain Public Officers and Employees of a State or a Political Subdivision Thereof, on or before the due date of his 1968 Federal income tax return.

U.S. citizens employed by foreign government, or international organizations.—A U.S. citizen employed in the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands by a foreign government, an instrumentality wholly owned by a foreign government, or an international organization which is organized under the International Organizations Immunities Act, is subject to the social security self-employment tax. Such an employee should report his income from such employment on line 5(c), of this Schedule, compute his self-employment tax, and file the Schedule with his Form 1040. In item B of Schedule SE, enter "Employee of foreign government, etc."

Farm income.—Report farm income and net earnings from farm self-employment on Schedules F and F-1 (Form 1040).

EXCLUSIONS

Income (or loss) from the following sources and deductions attributable thereto are not taken into account in figuring net earnings from self-employment. Use line 4 to exclude any such amounts reported on separate Schedule C (Form 1040) that should not be taken into account in figuring your self-employment income.

Employees and public officials.—Income (fees, salaries, etc.) from the performance of service as: (a) a public official (except as noted above); (b) an employee or employee representative under the railroad retirement system; or (c) an employee (except as indicated above).

Note.—Income of an employee 18 or over from the sale of newspapers or magazines to an ultimate consumer is subject to self-employment tax if the income consists of retained profits from such sales.

Certain payments to retired partners.—Income received by a retired partner under a written plan of the partnership which provides for lifelong periodic retirement payments if the retired partner no longer has any interest in the partnership (except for the right to the retirement payments) and did not perform any services for the partnership during the year.

Real estate rentals.—Rentals from real estate, except rentals received in the course of a trade or business as a real estate dealer. This includes cash and crop shares received from a tenant or sharefarmer. These amounts should be reported in Schedule B (Form 1040), Part II. However, rental income from a farm is not excluded if the rental arrangement provides for material participation by the landlord and [illegible] materially in the production or in the management of the production of one or more farm products on his land. Such income represents farm earnings and should be reported on separate Schedules F and F-1.

Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as rooms in hotels, boarding houses, apartment houses furnishing hotel services, tourist camps or homes, or space in parking lots, warehouses, or storage garages do not constitute rentals from real estate and are included in determining net earnings from self-employment on this Schedule.

Interest and dividends.—Dividends on shares of stock, and interest on bonds, debentures, notes, certificates, or other evidences of indebtedness, issued with interest coupons or in registered form by a corporation, or by a government or political subdivision thereof, unless received in the course of a trade or business as a dealer in stocks or securities. Report these amounts on Form 1040, page 2, Part II.

Property gains and losses.—Gain or loss: (a) from the sale or exchange of a capital asset; (b) to which sections 631 and 1231 are applicable; or (c) from the sale, exchange, involuntary conversion, or other disposition of property if such property is neither (1) stock in trade or other property of a kind which would properly be includible in inventory if on hand at the close of the taxable year, nor (2) property held primarily for sale to customers in the ordinary course of the trade or business. These amounts should be reported on separate Schedule D (Form 1040).

Net operating losses.—No deduction for net operating losses of other years shall be allowed in determining the net earnings from self-employment. Such deduction should be entered as a "minus" figure on Form 1040, page 2, Part II, in "Miscellaneous income."

MORE THAN ONE TRADE OR BUSINESS.—If an individual is engaged in more than one trade or business, his net earnings from self-employment are the combined net earnings from self-employment of all his trades or businesses. Thus, the loss sustained in one trade or business will operate to reduce the income derived from another trade or business. An individual shall fill in and file only one Schedule C-3, including Schedule SE, for any one year.

JOINT RETURNS.—Where husband and wife file a joint income tax return, Schedule C-3 (Form 1040) should show the name of the one with self-employment income. Where husband and wife each have self-employment income, separate Schedules C and C-3 must be attached for each. In such cases the total of amounts shown on line 27 of each separate Schedule C should be entered on Form 1040, page 2, Part II, line 4, and the aggregate self-employment tax, line 13, Schedule C-3 should be entered on Form 1040, page 1, line 15.

COMMUNITY INCOME.—For the purpose of computing net earnings from self-employment, if any of the income from a trade or business is community income, all the income from such trade or business is considered the income of the husband unless the wife exercises substantially all the management and control of the trade or business, in which case all of such income is considered the income of the wife. (Also see instructions on partnerships below.)

If separate income tax returns are filed by husband and wife, Schedules C and C-3 should be attached to the return of the one with self-employment income. Community income included on Schedule C must be allocated between the two returns (on Form 1040, page 2, Part II, line 4) on the basis of the community property laws.

PARTNERSHIPS.—A partner, in computing his combined net earnings from self-employment, should include his entire share of such earnings from a partnership including any guaranteed payments. No part of that share may be allocated to the partner's wife (or husband) even though the income may, under State law, be community income. In the case of a husband-and-wife partnership, like other partnerships, the distributive share of each should be entered in Schedule B (Form 1040), Part III, for income tax purposes. For self-employment tax purposes the distributive share of each partner should be entered on line 5(b), of this Schedule (except that farm partnership earnings are to be reported on Schedule F-1 (Form 1040), line 1(b).

Note.—If a member of a continuing partnership dies, a portion o the deceased partner's distributive share of the partnership's ordina income (or loss) for the taxable year of the partnership in which h died must be included in the partner's net earnings from self-employment. In such cases consult an Internal Revenue Service office to how to report.

SCHEDULE SE (Form 1040)

Schedule SE provides the Social Security Administration with information on self-employment income necessary for computi benefits.

Regardless of whether joint or separate returns are filed husband and wife, Schedule SE (Form 1040) must show the name of the one with the self-employment income. H ever, if both had self-employment income, a separate Sched SE must be filed by each.

FORM 3468
U.S. Treasury Department
Internal Revenue Service

Computation of Investment Credit

TO BE ATTACHED TO YOUR TAX RETURN
For calendar year 1968 or other taxable year beginning
.... 1968, ending .... 19.....

19

Name
SHERMAN + POLLY UNGER
7935 Indian Hill Rd
Cincinnati, Ohio 45243

Identifying number as shown on page 1 of your tax return
286 20 7911

1 Investment in new and used property including any investment in suspension period property
NOTE: Include your share of investment in property by a partnership, estate, trust, small business corporation, or lesso

Type of property	Line	(1) Life years	(2) Cost or basis	(3) Applicable percentage	(4) Investment (Column 2 x colum
NEW PROPERTY	(a)	4 or more but less than 6		33⅓	
	(b)	6 or more but less than 8		66⅔	
	(c)	8 or more		100	229.
USED PROPERTY (See instructions for dollar limitation)	(d)	4 or more but less than 6		33⅓	
	(e)	6 or more but less than 8		66⅔	
	(f)	8 or more		100	

2 Total investment—Add lines 1(a) through (f)	229
3 (a) Amount of investment on line 2 which is attributable to suspension period property	
(b) Amount of exemption from suspension period property (cost of suspension period property in column 2, line 1, which is selected to be treated as qualified property—not to exceed $20,000 less any amount selected in prior years)	

(c) Enter in column 2 below the amount of investment on line 3(b) according to life years:

(1) Life years	(2) Cost or basis	(3) Applicable percentage	(4) Column 2 x column 3
4 or more but less than 6		33⅓	
6 or more but less than 8		66⅔	
8 or more		100	

(d) Total of column 4	
4 Line 3(a) less line 3(d)	-
5 Total qualified investment—Line 2 less line 4	229.
6 Tentative investment credit—7% of line 5 (3% for public utility property)	16.
7 Carryback and carryover of unused credit(s) (attach computation)	
8 TOTAL—Add lines 6 and 7	

LIMITATION

9 (a) Individuals—Enter amount from line 12(c), page 1, Form 1040		
(b) Estates and trusts—Enter amount from line 27, page 1, Form 1041		
(c) Corporations—Enter amount from line 7, Tax Computation Schedule, Form 1120		
10 Individuals, estates and trusts: (a) Foreign tax credit		
(b) Retirement income credit		
11 Total—Add lines 10(a) and (b)		
12 Line 9 less line 11		
(Married persons filing separately, affiliated groups, estates and trusts, see instruction 13)		
13 (a) Enter amount on line 12 or $25,000, whichever is lesser		
(b) If line 12 exceeds $25,000, enter 50% of the excess		
14 Total—Add lines 13(a) and (b)		
15 Less 7% of line 4 (3% for public utility property)		
16 Line 14 less line 15		16.
17 Investment credit—Enter amount on line 8 or line 16, whichever is lesser		

SCHEDULE A

If any part of your investment in 1 above was made by a partnership, estate, trust, small business corporation, or lessor complete the following:

Name (Partnership, estate, trust, etc.)	Address	Property New	Property Used
		$	$

Miscellaneous

Cincinnati Bar Dues	25.00
American Bar & Section Dues	48.50
Ohio State Bar Dues	35.00
Current Professional Reading	128.00 –?
Queen City Association & meetings	112.50 –>
American [illegible] Advisors Club	25.00
Tuck [illegible] Club	15.00
Snow Lodge	10.00
Metropolitan Club Washington	301.35 –>
Queen City Club Cincinnati	574.00 –?
University Club 50%	200.45 –>
Car expense 75% second auto	2200.50 –?
Capitol Hill Club	25.00
Business entertaining	785.00 –?
Business Expense not cover by partnership	462.00 –
World Peace Through Law planning Committee meeting Wash.	345.00 –?
Cincinnati Bar Meetings	63.00
Anti Trust Section meeting	127.00 –
	5481.50

Contribution Explanation:

Cincinnati Country Day School 35 shares of Baxter Labs valued at $1518.12 and $360.00 expenses for driving, parking, & supplies from July to Dec for Junior League children players.

Form **2950SE**
U.S. Treasury Department
Internal Revenue Service

Self-Employed Retirement Deduction

(Statement in support of deduction for payment to a qualified pension, profit-sharing, annuity or bond purchase plan for self-employed individuals)

196

Name as shown on page 1 of Form 1040 (Please print or type)

Social Security Number or Employer Identification Number

1(a) Name of plan
The Frost & Jacobs Profit Sharing Plan & Trust

1(b) Type of entity ☐ Sole proprietor ☒ Partnership

2 Is your plan part of a master or prototype plan?
☐ Yes ☒ No. If "Yes," give IRS serial number ....

3 Type of plan ☐ Pension or annuity ☒ Profit-sharing

4 Name and address of trustee, custodian, or insurance company

Employer Identification Number

5 Effective date of your plan
12/31/65

6 If a favorable determination letter or Form 3673 has been received indicating that this plan qual under section 401 of the Code, give date of the most recent determination and District Director's o

7 Medium of funding:
- (A) Trust
  - ☐ Insurance
  - ☐ General investments
  - ☐ Other
- (B) Custodial account
  - ☐ Mutual funds
  - ☐ Insurance
- (C) Insured
  - ☐ Group contract
  - ☐ Individual contract
- (D) U.S. Government Retirement Plan Bonds ☐
- (E) Other (specify) .... ☐

8 COVERAGE OF PERSONS—	Self-employed	Employees
Total persons covered		
Persons excluded because: Insufficient years of service		
Part-time or temporary		
Other (specify)		
Total persons covered and excluded		

9 COMPENSATION (or earned income)—		
(a) Covered	$	$
(b) Excluded		
(c) Total	$	$

10(a) Employer contributions made on behalf of participants who are not self-employed (enter here and on line 20, Schedule C of Form 1040; or col. 3, Part III, Schedule F of Form 1040; or line 24, Form 1065) . . . . . $

10(b) Dates paid

11(a) Employer contributions made on behalf of self-employed individual(s)	$ 2,500.00	11(d) Dates paid 12/31/68
(b) Less amount allocable to insurance protection (see instruction C)		
(c) Net contributions	$ 2,500.00	

COMPUTATION OF ALLOWABLE DEDUCTION FOR EMPLOYER CONTRIBUTIONS MADE ON BEHALF OF SELF-EMPLOYED INDIVIDUAL WH EMPLOYER'S TAX YEAR BEGINS ON OR AFTER JANUARY 1, 1968. (FOR YEARS BEGINNING BEFORE JANUARY 1, 1968 SEE INSTRUCTIO

If more than one plan is involved, combine amounts for line 12 for all plans and enter result on one form only.

12(a) Enter amount on line 11(c)	2,500.
(b) Earned income (net earnings from self-employment) (see instruction D)	48,592.
(c) 10% of line 12(b)	4,859.
(d) Enter amount on line 12(c) not to exceed $2,500	2,500.
(e) Amount allowable as a deduction (line 12(a) or 12(d), whichever is lesser). Enter here and on line 4, Part III, page 2, Form 1040	2,500.

INFORMATION RELATING TO PRIOR YEARS

Total accumulated contributions in prior years made on behalf of self-employed individual	7,500.
Total accumulated deductions on Form 1040 in prior years on behalf of self-employed individual	3,750.

Schedule A—SUMMARY OF TRUST OR CUSTODIAL ACCOUNT

1 Balance at beginning of year		
2(a) Employer contributions during the year		
(b) Employee contributions during the year		
(c) Earnings		
(d) Adjustments (attach schedule)		
3 TOTAL (add lines 1 and 2)		
4 Less distributions for the year		
5 Balance at end of year		

Instructions

(References are to the Internal Revenue Code)

A. Who Must File.—Self-employed individuals (including partners) and partnerships claiming a deduction for contributions to a qualified pension, profit-sharing, annuity or bond purchase plan where such plan includes self-employed individuals must file this form to substantiate the deduction. For plans which do not include self-employed individuals, file Form 2950.

A self-employed individual is an individual or partner who has earned income as described in instruction D from an unincorporated trade, business, or profession.

B. Filing of Return.—File this form with your tax return for the taxable year in which a deduction is claimed.

A separate Form 2950SE must be filed for each plan. However, where more than one form is required, the overall limitation in item 12 need be completed on only one form.

If a favorable determination letter has not been received with respect to your plan and your plan is not part of a master or prototype plan, in addition to filing Form 2950SE, you must submit the information required by Section 1.404(a)–2, Income Tax Regulations, to the extent applicable for the first year a deduction is claimed.

If your plan has been amended since the last favorable determination letter was received, and your plan is not part of a master or prototype plan, in addition to filing Form 2950SE, you must submit the information required by paragraph (b)(1) of Section 1.404(a)–2, Income Tax Regulations.

If amendments are made to a plan (individual and master or prototype) involving self-employed individuals to cover only changes made by Public Law 89–809 (covered under instruction D below), a previously issued favorable determination letter will apply to the plan as amended. A plan so amended is not to be resubmitted for further determination and no new determination letter will be issued.

Partnerships.—Partnerships need complete only items 1 through 11, and Schedule A.

Partners.—A partner who is covered only by a partnership plan need complete only items 1, 11, and 12.

A partner who is covered by more than one plan must file a form for each plan. Complete lines 1 and 11 for each partnership plan and lines 1 through 11 and Schedule A for each individual plan. The overall limitation as computed on line 12 need only be summarized on one form for all the plans.

NOTE: Under the provisions of Public Law 89–809 (which removed the limitations on the amount allowed as a deduction by section 404(a)(10) of the Code for taxable years beginning after December 31, 1967), any contributions to a qualified plan by a partnership on behalf of a self-employed individual in a taxable year of the partnership beginning prior to January 1, 1968 will continue to be subject to the fifty percent limitation imposed by section 404(a)(10) of the Code. Therefore, an individual partner may deduct only one-half of the contributions made for his benefit during the taxable year of a partnership beginning before January 1, 1968, even though his taxable year begins on or after that date. Likewise the partner would have to consider the definition of earned income applicable to years before January 1, 1968 (P.L. 89–809 amended section 401(c)(2) of the Code covering earned income). Partners having this situation should attach a separate schedule showing the computation of the deduction.

C. Amount of Deduction.—You may deduct contributions for employees, only to the extent that they are ordinary and necessary trade or business expenses and to the extent they are within the limitations of section 404.

Contributions allocable to insurance protection.—For purposes of determining the amount deductible with respect to contributions on behalf of a self-employed individual, amounts allocable to the purchase of life, accident, health, or other insurance protection shall not be taken into account. Enter such amounts on line 11(b). The amount of a contribution allocable to insurance shall be an amount equal to a reasonable net premium cost for such amount of insurance for the appropriate period.

D. Earned Income.—Taxable Years Beginning On or After January 1, 1968.—Earned income means net earnings from self-employment with respect to a trade or business in which personal services are a material income producing factor. Generally, a self-employed person may treat his entire share of the net profits of the trade or business as "earned income" even though both personal services and capital are material income-producing factors.

Income from disposition of certain property.—For retirement plan purposes, earned income includes gains (other than gain from the sale or exchange of a capital asset) and net earnings derived from the sale or other disposition of, the transfer of any interest in, or the licensing of the use of property (other than good will) by an individual whose personal efforts created the property. Section 401(c)(2)(C).

For a more detailed explanation of earned income, see section 401(c) and the regulations thereunder.

Publication 560, Retirement Plans For Self-Employed Individuals, covering the law before and after January 1, 1968 may be obtained free from your Internal Revenue office.

☆☆☆☆ U.S. GOVERNMENT PRINTING OFFICE : [illegible]

CINCINNATI COUNTRY DAY SCHOOL
6905 GIVEN ROAD • CINCINNATI, OHIO 45243

HERBERT H DAVISON
HEADMASTER

UPPER SCHOOL 561-7298
LOWER SCHOOL 561-7297

February 19, 1969

Mr. Sherman Unger
7935 Indian Hill Road
Cincinnati, Ohio 45243

Dear Mr. Unger:

Thank you for your letter of February 4, 1969, in which you noted the discrepancy of amounts contributed to the Capital Funds Drive.

Whenever a gift of stock is given to a charitable organization, the value of the stock on the day of transfer is used for tax purposes. Therefore, your gift to the School can be claimed as $1,518.12. The amount of $1,374.89 was the net amount which the School received by the time of sale because of the market decline, commissions, taxes, etc.

Your obligation to Cincinnati Country Day School has certainly been fulfilled and we are very grateful. I hope that this letter clarifies the situation.

Sincerely yours,

Louis K. Colgan

Louis K. Colgan, Business Manager

LKC:tl

(REV. JULY 1967)

PRELIMINARY STATEMENT

NAME OF TAXPAYER(S)
Sherman E. and Polly V. Unger
7935 Indian Hill Road
Cincinnati, Ohio, 45243

SHOW SOCIAL SECURITY OR EMPLOYER IDENTIFICATION NUMBER (Husband's number if joint return) 266 20 7911

SUMMARY OF PROPOSED ADJUSTMENTS

TAXABLE YEAR	INCOME TAX		OTHER TAX (Specify) DEFICIENCY OR OVERASSESSMENT	Negligence PENALTIES-INCREASE ~~OR (DECREASE)~~ 301.6653-1(a)	Negligence [illegible] ~~PARTNERSHIP, FIDUCIARY OR SMALL BUS. CORP. INCOME INCREASE OR (DECREASE)~~ on agreed portion
	DEFICIENCY	Agreed ~~OVERASSESSMENT~~ Portion			
1967	$ 2,776.31	$ 2,776.31	$	$	$
1968	98,231.27	20,748.01		4,911.56	1,037.40
1969	315.76	315.76			
TOTALS	$ 101,323.34	$ 23,840.08	$	$ 4,911.56	$ 1,037.40

NET DEFICIENCY ~~OR (OVERASSESSMENT)~~	NAME OF EXAMINER	NAME OF TAXPAYER'S REPRESENTATIVES	AGREEMENT SECURED
$ 106,234.90	Frances M. Jeffre	Leonard L. Silverstein, Wash.D.C., Wm.R.Seaman & J.L.Cowan,Attys.	☐ YES ☐ NO Partial

PRINCIPAL CAUSES OF CHANGES, AND OTHER INFORMATION

The principal causes of the changes proposed in this report, are additions to 1968 income for services performed for co-investors in Modern Media,-Inc.; and lack of substantiation of dependency claim for grandmother, and of some miscellaneous expenses claimed under Itemized deductions.

A portion of this report is agreed and has been so identified. You have signed Form 870 for the agreed portion and have agreed to assertion of the negligence penalty under Reg. 301.6653-1(a) on the agreed deficiency for 1968. The negligence penalty was recommended because you did not use reasonable care in preparing your 1968 income tax return.

You filed an amended return for 1968 on May 20, 1970, and paid additional tax of $16,988.99. As of this date, this additional tax has not been assessed, but stands in your account with us, as a credit.

EXHIBIT A

SCHEDULES AND/OR EXHIBITS ATTACHED

G.P.O.: 1967 O - [illegible]

FORM 1907 (REV. 7-67)

PAGE ______

RECEIVED
31 JAN 1971
DIRECTOR INT REV
CINCINNATI
TELLER - 21

District Director of Internal Revenue
P. O. Box 476
Cincinnati, Ohio 45201

Re: Sherman and Polly Unger - 1968

Dear Sir:

Receipt is hereby acknowledged of your letter dated November 4, 1970 enclosing the report of Examining Officer Frances M. Jeffre dated October 20, 1970 and proposing deficiencies in the Federal income tax liability of the above named taxpayers for the calendar and taxable years 1967, 1968 and 1969 in the amounts of $2,776.31, $98,231.27, and $315.76, respectively, and asserting the 5% negligence penalty provided for under section 6653 of the Internal Revenue Code.

Pursuant to permission granted in your letter, protest is hereby made against the proposed deficiency and penalty and the Examining Officer's findings. In support hereof the following facts are submitted.

a) Name and Address of Taxpayers.

Sherman E. and Polly V. Unger
7935 Indian Hill Road
Cincinnati, Ohio 45243

EXHIBIT B

b) Date and Symbols of Your Letter.

November 4, 1970 - RL 4-42 Code 430

c) Years Involved and Disputed.

1968 $81,357.42

d) Findings to which the Taxpayers Take Exception.

1. The finding of the Examining Officer that the taxpayers, Sherman Unger and Polly Unger, realized additional income in

the year 1968 over and above that reported on their original and amended returns for that year in the amount of $136,666.67, purportedly for services rendered by Mr. Unger to co-investors in Modern Media, Inc. and its subsidiary, Modern Talking Picture Service, Inc.

e) Facts upon which the Taxpayers Rely.

The Examining Officer in her lengthy and quite detailed explanation of the basis for her determination, which contains certain misstatement of the facts; partial statement of other facts; and omits entirely other facts of which she was fully aware, has attempted to create an implication or an inference of the existence of additional facts essential to support her conclusion, in itself based on an inference, that Sherman Unger received a "constructive" payment (no actual payment was ever made or received) of additional compensation for "services to co-investors" in the amount of $136,666.67.

Although the lengthy and involved recitation of "facts" commencing on p. 6 and running through p. 9 of the Examining Officer's report purports to support her position with reference to the additional income item (d) on Schedule 3d of $37,306.14 (which amount is her computation of the tax on the income reported and taxed by taxpayer's amended return), certain of the alleged facts set forth therein are later urged by the Examining Officer as providing support for her determination that Mr. Unger received additional compensation in the amount of $136,666.67 from Messrs. Resor and/or Taylor and/or Ohio

Venture Capital Corporation and/or Midwest Venture Capital Corporation. Without elaborating on such factual errors herein (taxpayers' representatives believe that such errors can be more properly considered in the context of a District Conference) some passing reference to some of these errors is appropriate here.

First, by quoting only limited parts of the tender offer letter, the Examining Officer attempts to infer that at the time of the issuance of the tender offer Mr. Unger already had a binding commitment from Messrs. Resor and Taylor or the venture capital corporations to honor the terms of the tender offer if it was accepted by the stockholders of Modern Talking Picture Service, Inc. (MTPS). This was not the case. Both Messrs. Resor and Taylor had expressed considerable interest in the purchase, but at the time of the issuance of the tender offer, May 10, 1968, they were not legally committed to either purchase the stock of MTPS or to share in any potential liability which might have ensued had Mr. Unger defaulted in the performance of the terms and conditions of the tender offer.

Second, the Examining Officer refers to the resolution of the Board of Directors of MTPS authorizing the sale of the assets and liabilities of the company to Sonderling Broadcasting Co., wherein a fee of $300,000 was to be paid to Commonwealth Corporation Dev. Co. of Philadelphia for its services on the sale and $100,000 was to be paid to a Mr. Sidney Pepper; and that after Mr. Unger's offer of May 10, 1968, the Board of MTPS rescinded the earlier resolution. The implication is that the resolution was rescinded solely by reason of Mr. Unger's offer, whereas the facts are that the resolution authorizing the sale to Sonderling was based upon certain misrepresentations by Mr. Pepper as to the extent of his personal and financial involvement with the parties involved, and the rescission of the resolution resulted from the discovery of those misrepresentations, and the determination of the Board and the stockholders of MTPS that the fees called for under the resolution were totally unreasonable. Subsequently, in her report the Examining Officer uses this resolution as "evidence" of the value of the alleged services in an "arm's length" transaction. This is patently ridiculous for a host of reasons, not the least of which are that the transaction was never consummated, and as litigation involving MTPS and its shareholders against Mr. Pepper disclosed, it most certainly was not evidence of the reasonable value of such services.

Third, the Examining Officer states that on June 11, 1968 Mr. Unger "billed his clients, Mr. J. T. Resor and the Midwest and Ohio Venture Capital Corporations for a total of $40,000 for the right to acquire 2/3 of the capital stock of MTPS, Inc. ..." This statement is not accurate. Mr. Unger did deliver to Mr. Resor and the venture capital corporations receipts acknowledging the transfer of two-thirds of his rights to acquire the stock of MTPS in consideration of the payment of $40,000.

Fourth, there are other discrepancies in the Examining Officer's account of the formation and capitalization of Modern Media, Inc. (Media). Although correctly stating that Messrs. Unger, Resor and the venture capital corporations each acquired one-third of the stock of Media for $30,000 plus one-third of the right to acquire the stock of MTPS, and noting the fact that interest bearing demand notes were issued by Media to Mr. Resor and the venture capital corporations for $400,000, the Examining Officer conveniently ignores the sworn statements, copies of which were delivered to her, of both Mr. Resor and Mr. Taylor that at the time these notes were issued by Media, June 13, 1968, they both considered such notes to be a valid and binding obligation of Media, and fully expected to be repaid for such loans. As of June, 1968, their cost for their Media stock was exactly the same as Mr. Unger's: $30,000, not $250,000 as the Examining Officer states.

Fifth, throughout her report, the Examining Officer by reference to "the $2,551,500 corporation" and the "minimal" investment of the shareholders in Media, attempts to convey the idea that the purchase of MTPS was a "bargain" purchase for all of the shareholders of Media, and especially Mr. Unger, and that the shareholders have made enormous profits on the transaction. That there was a very great risk involved in the purchase, which justifies the use of substantial amounts of debt to finance the purchase, can easily be seen by evaluating the purchase with the benefit of a little of the hindsight which the Examining Officer so frequently utilizes to support her conclusions. Following an unsuccessful effort to effect a public offering of the stock of MTPS in the spring and summer of 1969, MTPS was merged in KDI Corporation in December of 1969. Each of the three principal shareholders of MTPS (Messrs. Resor, Unger and the two venture capital corporations) received approximately 50,000 shares of the common stock of KDI Corporation. Because of S.E.C. rules relating to "pooling of interests", however, the MTPS shareholders had only limited rights to dispose of the stock acquired in the merger. As of January 4, 1971, with the principal MTPS shareholders still holding, directly or indirectly, nearly all of the stock acquired in the merger, the value of their total investment was approximately $187,500, for which they paid $490,000, and KDI Corporation had filed a petition for reorganization under Chapter XI of the Bankruptcy Act.

There are other errors of a factual nature in the Examining Officer's recitation. However, most of this recitation would appear to have very little, if any, relevancy to the major item of the proposed deficiency and, accordingly, no useful purpose would be served in discussing them in this Protest.

With reference to the Examining Officer's Explanation of the principal item of adjustment, commencing on page 14 of her report, there are also both errors of commission and omission.

Re: Sherman and Polly Unger - 1968

The real difficulty the taxpayers and their representatives have with the Examining Officer's recitation which purports to support her conclusion that Mr. Unger had additional income in the amount of $136,666.67 in 1968 is that it ignores or omits pertinent facts, of which the Examining Officer was aware, but which are totally inconsistent with her premise, and it either ignores or disregards events which took place and their effect on the chronology of the transactions involved to the point where the effect overall of the statement is substantial distortion of what transpired.

At the outset, for example, the Examining Officer states: "There was a disproportionate distribution of Modern Media stock." This statement is totally inaccurate. There was only one distribution of Media's stock which took place on or about June 13, 1968, pursuant to the performance of subscription agreements executed June 7, 1968 wherein Messrs. Unger and Resor each received 200 common shares of Media and the two venture capital corporations each received 100 common shares of Media for a consideration of $150 per share plus 1/600 of the rights to acquire MTPS. The Examining Officer attempts to bootstrap herself into the application of a disproportionate distribution of stock under section 351 of the Code, by a "thin" capitalization argument which she contends justifies her conclusion that Mr. Resor and the venture capital corporations paid $460,000 for the 400 shares of common stock of Media issued to them on or about June 13, 1968. From this "conclusion", the Examining Officer then infers that since Mr. Resor and the venture capital corporations "paid" $460,000 for two-thirds of the stock of Media and Mr. Unger only paid $30,000 for one-third of the stock of Media, they (Resor and the venture capital corporations) were paying off their "obligation" to Mr. Unger.

These "conclusions" simply will not stand the light of analysis. As to the "thin" capitalization argument, the Examining Officer completely misconstrues the effect of a determination that a corporation is too thinly capitalized. In tax cases, a finding by a court that a security which purports to be a debt instrument is to be treated for tax purposes as though it were an "equity" investment in the corporation, has either or both of the following tax effects: (1) a disallowance, as a corporate deduction, of the "interest" paid or accrued on the security; or (2) the classification of repayments of "principal" of the debt as taxable dividends rather than a tax-free return of capital.

But neither the question of the deductibility of the interest payments to Media nor the classification of any repayment of principal are at issue in this proceeding. None of the "thin" capitalization cases even purport to consider the matter critical to the Examining Officer's conclusion, let alone give support for her position. Even assuming for purposes of illustration that the loans of Mr. Resor and the venture capital corporations constituted an "equity" investment in the company, and the taxpayers do not intend to concede or even imply that this was the case, there still remains open the questions of the nature of that equity and its characteristics for both tax and non-tax purposes. The Examining Officer blithely assumes that the loans were an equity investment, and that they were simply additional payments for the common stock issued at the inception of the corporation. The taxpayers believe that this assumption is insupportable, either factually or legally.

As the Examining Officer points out, the notes were surrendered and contributed to the capital of Media on December 3, 1968, nearly six months after their organization of the corporation and their issuance. She states that the stockholders in making the contribution to capital were simply recognizing their capital investment in June of 1968. Both Mr. Resor and Mr. Taylor have categorically denied this to be the case. In their affidavits they both state, under oath, that they considered the notes as valid and binding obligations of Media and that they fully expected to be repaid for such loans. Further, they state that the sole purpose of the contribution of the notes to capital was to facilitate the proposed public offering of the stock of MTPS which was being underwritten by Equitable Securities Morton & Co.

Taxpayers' representatives are perfectly aware of and recognize the fact that the Service, in determining whether or not a particular investment in a corporation is to be considered as equity as opposed to debt for purposes of otherwise categorizing _for_ _tax_ *purposes* payments made in the nature of interest and/or repayment of principal, are not necessarily bound by the stated intentions of the parties involved. We are not aware, however, of any basis or authority, which authorizes or permits the Service to alter or redefine the characteristics of a corporate security as it relates to the relationship of the security holder with the corporation and other security holders. The Federal courts will only take jurisdiction of matters involving the relationship of security holders to other security holders in bankruptcy or reorganization situations, and only then to assure the protection of the rights of outside creditors. See, *e.g.*, *Boyum* v. *Johnson*, 127 F. 2d 491 (8th Cir. 1942); *Arnold* v. *Phillips*, 117 F. 2d 497 (5th Cir. 1941). Thus, absent the "thin" corporation situation in its tax context (in which case the nature or legal relationships incident to the ownership of the security are irrelevant once it is determined to be an "equity" investment) or the bankruptcy context, the legal characteristics and relationships created by the issuance of a security are determined under the statutes and decisions of the law of jurisdiction under which the corporation was created. 13 Fletcher, *Private Corporations* §715; 3 Cavitch, *Business Organizations* §50.01 et seq. 18 Am. Jur. 2d, *Corporations* §§481,482.

The distinction between characterization of a security as an "equity" investment in a "thin" capitalization case and its characterization for other purposes is of more than academic interest in this proceeding. An illustration of the significance of this distinction can be demonstrated easily. Suppose, for example, that the stockholders of Media had determined to sell the stock or assets of MTPS and liquidate Media rather than merge the two companies and take MTPS public. Could Mr. Unger, in the liquidation proceedings, assuming that all outside creditors had been paid off from the proceeds of sale and the notes issued to Mr. Resor and the venture capital corporations were still outstanding, make the same argument made by the Examining Officer here, *i.e.*, that the notes were really equity, as the basis for a claim that he was entitled to one-third of the balance of the proceeds of sale with any real hope of success? We think the answer is obvious that he could not. See *Boyum* v. *Johnson*, *supra* and *Arnold* v. *Phillips*, *supra*.

It is also interesting to note, that in the only other area of tax law of which taxpayers' representatives are aware where the Service has advanced the "debt vs. equity" argument and where the other characteristics of the security were significant, it (the Service) has consistently taken a position directly contrary to the position of the Examining Officer taken here. This is in the "subchapter S corporation" cases where the Service has contended that the debt constituted a second class of stock. In *W. C. Gamman*, 46 T.C. 1 (1966) the court in discussing the Government's position stated:

> .... Respondent relies on the so-called thin capitalization cases, such as *O. H. Kruse Grain & Milling* v. *Commissioner*, 279 F. 2d 123; *Rowan* v. *United States*, 219 F. 2d 51; *Nassau Lens Co.* v. *Commissioner*, 308 F.

> 2d 39; Gilbert v. Commissioner, 248 F. 2d 399; 2554-58 Creston Corp., 40 T.C. 932, to conclude that the purported loans by petitioners to Century House were in reality contributions of additional capital, and that, as a corollary, the notes received by petitioners as evidence thereof were in substance stock, although they were in form debt obligations. Respondent then relies on the formal terms of the instruments to conclude that they gave petitioners rights in the income and assets of the corporation having priority over the rights petitioners had as stockholders, and therefore the notes were a second class of stock.

See also U.S. Treas. Regs. §1.1371-1(g).

The above discussion emphatically points up the fallacy of the Examining Officer's argument which requires as support the "telescoping" of the event of the cancellation of the notes in December, 1968 into the event of their issuance in June, 1968. In order for the Examining Officer to justify her ultimate conclusion that Messrs. Resor and Taylor were "paying their obligation to Mr. Unger" she must: (1) ignore the sworn statements of Messrs. Resor and Taylor; (2) ignore the six months lapse of time between June and December, 1968; and (3) disregard the issuance, the recording in minutes and the payment and reporting of interest on the notes entirely so that the $400,000 can be said to be additional payment for the 400 shares of Media originally issued to Mr. Resor and the venture capital corporations on June 14, 1968.

As indicated previously, Messrs. Resor and Taylor have stated under oath, in direct contradiction of the conclusion of the Examining Officer, that the sole purpose of the contribution of the notes to the capital of Media in December, 1968 was to facilitate the proposed public offering of the stock of MTPS by removing from the balance sheet "Notes to shareholders" as suggested by the underwriter, Equitable Securities, Morton & Co. as a necessary condition to handling the offering. This proposed public offering, although never completed by reason of adverse market conditions which prevailed in the summer of 1969, had it been completed in the context contemplated by the shareholders of Media and the underwriters in late November and early December of 1968, would have resulted in Messrs. Resor and the venture capital corporations each holding stock for which there was an established market of a value on the order of $1,800,000. This was the reason and motivation, according to Messrs. Resor and Taylor, behind the contribution of the notes to the capital of Media, not the discharge of some additional obligation the Examining Officer assumes, and Messrs. Resor and Taylor deny, was owed to Mr. Unger. Whatever obligation Messrs. Resor and Taylor may have had to Mr. Unger incident to the transfer of his rights (or obligation) to acquire the stock of MTPS pursuant to the tender offer, this obligation was fully paid and discharged in June of 1968. They neither recognized nor believed that they had any further or other obligation to Mr. Unger.

The facts incident to the contribution of the notes to the capital of Media by Mr. Resor and the venture capital corporations simply do not support the Examining Officer's thesis. Quite to the contrary, they negate the idea or concept that such contributions were really a payment of additional compensation to Mr. Unger. The facts do indicate and support a determination that the contributions neither were intended nor did confer any benefit in the nature of realized income on Mr. Unger. The intent of the contributions was that they would benefit Mr. Resor and the venture capital corporations by eliminating a clear impediment to the translation of an investment in closely held holding company to an investment in a company whose stock would be traded in an established market. Any indirect benefit that inured to Mr. Unger was purely incidental to the benefit that the other shareholders of Media believed they were obtaining for themselves. In December of 1968 they were faced with a business decision: eliminate the shareholder indebtedness by contributing the notes to the capital of Media and move forward with the public offering of the stock of MTPS; or continue the indebtedness and forego the public offering until the debt was paid. They chose the former course of action as being the alternative in their best interest. They were not required to nor did they obtain Mr. Unger's consent before taking this action.

What was the real effect of this action on Media, Mr. Resor, the Venture Capital companies and Mr. Unger? As to Media, it is clear that it realized no income by reason of its shareholders' contribution to its capital. U.S. Treas. Regs. Sections 1.61-12(a), 1.118-1. Mr. Resor and the venture capital corporations did not realize income, nor incur a "bad debt" loss by reason of the contribution to the capital of Media. See Leo Perlman, 27 T.C. 755 (1956), aff'd. 252 F. 2d 890 (2d Cir. 1958); Dezso Goldner, 27 T.C. 455 (1956); Harry Sackstein, 14 T.C.

566 (1950). The fact that the contributions were non-pro rata does not alter this result. See Leo Perlman, supra; Dezso Goldner, supra; and Harry Sackstein, supra. The contributions do result in an increase in the basis of the contributor's stock. U.S. Treas. Reg. Section 1.118-1. The benefit therefrom inured to Mr. Resor and the venture capital corporations, not Mr. Unger. As the Court of Appeals in the Perlman case stated:

> The cancellation increased the capital of the Company. Petitioners are not without benefit from the transaction because as the Tax Court (Raum, J.), commented "it increased the basis of petitioner's stock, and he will obtain tax benefit therefrom when he subsequently sells or otherwise disposes of his stock in a taxable transaction."

As to Mr. Unger, it seems clear that he might realize benefit from Mr. Resor's and the venture capital corporation action in contributing their indebtedness to the capital of Media. If the public offering of the stock of MTPS had been effected he would have benefited thereby in the same manner as Mr. Resor and the venture capital corporations. Even if the public offering did not take place, he still obtained some benefit simply by reason of the reduction of the total indebtedness of Media. Both of these "benefits", however, are pure and simply an unrealized increase in the value of the stock he held in Media (or following the merger of Media into MTPS) or MTPS.

Unrealized appreciation in the value of property is not income, however. This is one of the cardinal principles of income tax law deriving from a long line of cases beginning with Eisner v. Macomber, 252 U.S. 189 (1919), wherein the Court stated: "... enrichment through increase in value of capital investment is not income in any proper meaning of the term."

In 4 RIA, Tax Co-Ordinator ¶J-1001 the following statement appears:

> A taxpayer who owns appreciated property has no taxable income unless he "realizes" that increment. For example, a taxpayer buys a share of stock for $100. The stock increases in value to $110. So long as he holds his stock, the taxpayer "realizes" no income. In order to "realize" income, there must be a severance of interests. That is to say, there must be different economic interests after the transaction.

The taxpayers submit that the determination by the Examining Officer that they (or Mr. Unger) received additional compensation, over and above the amounts reported, in the amount of $136,666.67 is without merit. The Examining Officer concludes that simply because Messrs Resor and Taylor (the latter through the venture capital corporations) ended up paying more for their stock in MTPS than did Mr. Unger, that the difference in the ultimate cost of the stock constitutes income to Mr. Unger in the nature of additional compensation for services rendered. The facts clearly negate such a conclusion. Admittedly, the taxpayer either rendered services or transferred property rights to Messrs. Resor and Taylor, and for these services or property he was paid in June 1968 $40,000 (whether the payment is treated as compensation or short-term capital gain is immaterial, since the tax effect is the same). Both the taxpayer and the other shareholders of Media believed and understood that this payment was a full and complete discharge of any and all obligations that might have been due and owing to Mr. Unger. They (the other shareholders) had no further financial obligation, either legal or moral, to him. Their actions in effecting contributions to the capital of Media, taken without Mr. Unger's knowledge or assent, were undertaken purely in self-interest and for their own benefit, not Mr. Unger's. The fact that Mr. Unger might also benefit by this action does not support or justify a conclusion that he realized taxable income thereby. It is a fundamental theory of income tax law that it is essential to the taxation of income that it has been realized by the taxpayer to whom it is proposed to tax it. Estate of Florence Carr, 37 T.C. 1173 (1962); Campbell v. Prothro, 209 F. 2d 331 (5th Cir. 1954).

f) District conference requested.

It is requested that determination be made that the Examining Officer's findings, as protested herein, are in error, and that taxpayers' returns as previously adjusted and agreed upon are correct. In the event such determination is not considered possible, a district conference is requested in the District Office at a time convenient to that office.

Re: Sherman and Polly Unger - 1968

Respectfully submitted,

Sherman Unger

Sherman Unger

Polly Unger

Polly Unger

Under penalties of perjury, I declare that I have examined the statement of facts presented in this protest and in any accompanying schedules and statements and, to the best of my knowledge and belief, they are true, correct and complete.

Sherman Unger

Sherman Unger

Polly Unger

Polly Unger

I, Jerry L. Cowan, attorney at law, declare that the foregoing protest was prepared by me, and that to the best of my knowledge and belief, the facts therein set forth and in any accompanying schedules are true, correct and complete.

Jerry L. Cowan

Jerry L. Cowan

NAME		TAXABLE YEARS ENDED		
SHERMAN E. AND POLLY V. UNGER			12-31-69	
TAXABLE INCOME OR ADJUSTED GROSS INCOME AS SHOWN IN: ☐ RETURN AS FILED ☒ PRELIMINARY LETTER DATED Nov. 4, 1970 AND JULY 15, 1971 ☐ STATUTORY NOTICE DATED			$226,027.40	
INCREASES (DECREASES) IN INCOME: *(See attached explanation of items)* (a) SERVICES TO CO-INVESTORS DISTRICT DIRECTOR'S ADJUSTMENT ELIMINATED			(136,666.67)	
(b) "OTHER PROPERTY" RECEIVED IN AN EXCHANGE UNDER SECTION 351(a) RECOGNIZED AS TO ITS VALUE UNDER SEC. 351(b) OF THE CODE. HOLDING PERIOD OVER 6 MOS. LONG TERM GAIN. SEC. 1202 DEDUCTION 50%.		$11,250 (5,625)	5,625 –	
TAXABLE INCOME AS REVISED OR ~~ADJUSTED GROSS INCOME AS REVISED~~			$94,985.73	
TAX COMPUTATION	TAX, SCH G, INCOME AVERAGING		$37,541.27	
	TAX SURCHARGE – .075%		2,815.60	
	TAX PLUS SURCHARGE		$40,356.87	
	LESS:—TAX CREDITS INVESTMENT (RETURN)		16.07	
	SUBTOTAL		$40,340.80	
	ADD: SELF-EMPLOYMENT TAX		–	
	TAX FROM RECOMPUTING PRIOR YEAR INVESTMENT CREDIT		–	
	TAX LIABILITY		$40,340.80	
	LIABILITY PREVIOUSLY ASSESSED ORIGINAL RETURN		16,569.37	
	ADDITIONAL (AGREEMENT 870)		20,742.01	
	DEFICIENCY *(Overassessment)*		3,029.42	

ADDITION TO TAX, SEC. 6653(a), NEGLIGENCE

TOTAL ADDITION	$ 1188.57
PREVIOUSLY ASSESSED	1 037.40
DEFICIENCY IN ADDITION TO TAX	$ 151.17

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE GPO : 1971 O - 100-111 FORM 3611 (REV. 3-70)

EXHIBIT C

ARTHUR ANDERSEN & CO.

425 WALNUT STREET
CINCINNATI, OHIO 45202
(513) 381-6900

September 8, 1983

Mr. Sherman E. Unger
General Counsel
Room 5870
Department of Commerce
14th & Constitution
Washington, D.C. 20230

Dear Mr. Unger:

Enclosed is a schedule summarizing your taxable income, taxes and credits for the years 1977 through 1982. Please note that these figures are after adjustment for Revenue Agent Revues and IRS adjustments.

If you have any questions, please call.

Very truly yours,

ARTHUR ANDERSEN & CO.

By
D. Eugene Ewing

Enclosure
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EXHIBIT D

SHERMAN E. & NANCY M. UNGER
SUMMARY OF TAXABLE INCOME & TAX LIABILITY
1977 - 1982

Year	Taxable Income	Tax Liability	Minimum Tax	ITC Recapture	SE Tax	Credits	Total Tax
1977	$145,486	$65,469	$7,031	$496	$1,304	($6,722)	$67,578
1978	113,420	48,962	5,469	760	462	(5,876)	49,777
1979	138,773	65,310	2,511	654	1,855	(5,177)	65,153
1980	294,205	152,851	None	93	2,098	(2,181)	152,861
1981	205,727	109,540	24,916	410	2,583	(9,625)	127,824
1982 (estimated)	278,810	126,854	5,278	4,000	3,029	(1,000)	138,16[illegible]
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Totals	$1,176,421	$568,986	$45,205	$6,413	$11,331	($30,581)	$601,354
	==========	========	=======	======	=======	========	========
Average	$196,070	$94,831	$7,534	$1,069	$1,889	($5,097)	$100,226
	========	=======	======	======	======	=======	========

Ethics (Conflicts, Generally

OGC Index Digest Office

GC:LEG 1

June 19, 1970

Honorable Sherman Unger
General Counsel
Department of Housing and
  Urban Development
Washington, D. C. 20410

EXHIBIT E

Dear Mr. Unger:

This refers to your letter of June 9, 1970, which makes inquiry as to possible conflict-of-interest situations that relate to some members of the board of directors of the Federal National Mortgage Association (FNMA).

Before responding to your inquiry, it is necessary to set forth certain basic understandings. The FNMA was created by Federal statute but is not an executive agency as defined in 5 U.S.C. 105.[1] There are 15 members on the board of directors of FNMA, 5 of whom are appointed by the President of the United States and the remainder of whom are elected by the common stockholders in FNMA. Any member of the board of directors may be removed from office by the President for "good cause". The board, among other powers, is authorized "[w]ithin the limitations of law and regulation", to determine the general policies which govern the operations of the corporation. In addition, the board selects and appoints the president, vice president, and other officers of FNMA as may be provided for in the bylaws.

The Secretary of Housing and Urban Development has general regulatory power over FNMA and is authorized to make "such rules and regulations as shall be necessary and proper to insure that the purposes of this subchapter [subchapter III of chapter 13 of title 12, "National Mortgage Associations] are accomplished." (12 U.S.C. 1723a(h).) One of the purposes of the subchapter is to "manage and liquidate federally owned mortgage portfolios in an orderly manner, with a minimum of adverse effect upon the home mortgage market and minimum loss to the Federal Government." (12 U.S.C. 1716(c).) In addition, the Secretary may examine and audit the books and financial transactions of FNMA and the corporation may issue no stock obligation, security or other instrument without the prior approval of the Secretary. (12 U.S.C. 1723a(h).) It is also pertinent that the Secretary of the Treasury controls the volume and rate of interest of FNMA borrowings and obtaining resources through the sale of mortgage-backed securities.

The basic understandings set forth above support the conclusion that FNMA is an entity in the executive branch of the Government which, although substantially controlled by private stockholders, is performing a Federal function under significant Governmental control so as to be a quasi-Governmental organization. By reason of this conclusion, each member of the board of directors of FNMA appointed by the President of the United States would qualify as an "officer" as defined in 5 U.S.C. 2104 in the absence of 12 U.S.C. 1723a(d)(2), footnote 1 *supra*. That is, such a board member meets all the criteria in section 2104 as he is required by law to be appointed to a civilian position in

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1. 12 U.S.C. 1723a(d)(2) provides that "Except as provided in this subsection [which saved retirement benefits], the corporation shall not be subject to the provisions of title 5 [of the United States Code]."

the executive branch by the President, is performing a Federal function under authority of law, and is subject to the supervision of the President while engaged in the duties of his office.[2]

While these Presidential appointees are not "officers" for the purpose of title 5 by reason of 12 U.S.C. 1723a(d)(2), the fact that they otherwise fully qualify under the criteria for officers is persuasive that they are officers in the executive branch for conflict-of-interest purposes. Section 208 of title 18 relative to acts affecting a personal financial interest refers to "an officer * * * of the executive branch". Section 705 of Executive Order 11222, which prescribes standards of ethical conduct for Government officers, defines an "officer" as an "officer * * * of an agency" and "agency" is defined in the same section to include a Government corporation which FNMA basically is.

We are not unaware of 42 Op. Atty. Gen. No. 11 (October 25, 1962) which held that the fact that directors of the Communications Satellite Corporation are appointed by the President of the United States, by and with the advice and consent of the Senate, was not determinative as to whether they are officers of the United States. The Attorney General, after examining the nature of that corporation and its board of directors, held that the board members were not officers of the United States. There are, however, two important conditions regarding that corporation which the Attorney General stressed and which are entirely different from the conditions with respect to FNMA and its board of directors.

First, the Communications Satellite Corporation was expressly declared "not to be an agency or establishment of the United States Government". (42 U.S.C. 731.) With regard to FNMA there is no such express exclusion and, as shown above, there are several indicia that support the conclusion that FNMA is a quasi-Governmental organization. Second, the Attorney General referred to the tenure and duties of the Communications Satellite Corporation's board of directors and concluded that they held a private, rather than a public, office. On the other hand the members of the FNMA have a different tenure as they occupy what are actually temporary (one year appointment) positions and may be removed at any time by the President for good cause. Moreover, their duties -- the directorship of what has been termed a "Government sponsored private corporation"-- are more Government oriented than private oriented. We are, accordingly, of the opinion that 42 Op. Atty. Gen. No. 11 is not here controlling.

With respect to the members of the FNMA board of directors who are not appointed by the President of the United States, there is little doubt that they are not officers in the Government by reason of the fact that they are not "appointed" as required under criteria such as appear in 5 U.S.C. 2104 and 29 Comp. Gen. 363, 366 and 37 Comp. Gen. 138. However, this does not mean that the absence of an officer status places these elected board members in a category in which there are no Governmental considerations of ethical conduct or means to control actual conflicts of interest or the appearance thereof. As shown hereinbefore, all board members perform what is essentially a Federal or public function. Moreover, in apparent recognition of the public function performed by these board members, Congress gave the President of the United States express authority to remove them from office (both appointive and elective office) for "good cause". It would be incongruous to hold that action by a Presidentially appointed board member which is proscribed by law, Executive order, or executive branch regulation and which would

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2. Supervision is established not only with respect to the Presidentially appointed members of the board of directors but with respect to all board members by reason of the President's express authority to remove any member of the board for "good cause" (12 U.S.C. 1723(b).) In addition, supervision is evidenced by the statutory controls over FNMA placed in the Secretary of Housing and Urban Development. (12 U.S.C. 1723a(h).)

constitute "good cause" for the removal of such a board member, would not be "good cause" for the removal of an elected board member. There can be no double standard for comembers of a single board of directors such as exists in FNMA. While the manner of their entry on the board is different, their conduct as board members must be judged by identical standards.

We come now to the standards specifically applicable to the Presidential appointees on the FNMA board of directors and which, as explained above, are equally applicable under the Presidential control authority to the elected board members.

Section 208 of title 18 makes it a criminal offense for an officer of the Government to participate personally and substantially in his official capacity by approval, disapproval, or recommendation in a ruling or other determination or other particular matter in which he knows that he, his partner, or an organization in which he is an officer or director has a financial interest.

Executive Order 11222 and the regulations of the Civil Service Commission pursuant thereto (5 CFR Chapter 735) prohibit an officer of the Government who is a "special Government employee"[3] from any use of his office that is motivated, or appears to be motivated, by a desire for private gain for himself or any organization with which he has business or financial ties. Such an officer is also prohibited from using his office in any way to coerce, or to give the appearance of coercing, another person to provide a financial benefit to an organization with which he has business or financial ties. Furthermore, by reason of 5 CFR 735.301, under which the appropriate ethical conduct standards applicable to regular officers may be made applicable to "special Government employees", such an officer is prohibited from taking any action -- whether or not specifically prohibited -- which might result in, or create the appearance of using public office for private gain, giving preferential treatment to any organization, losing complete independence or impartiality of action, or affecting adversely the confidence of the public in the integrity of the Government. In addition, an officer is prohibited from having a direct or indirect financial interest that conflicts substantially, or appears to so conflict, with his duties and responsibilities as an officer of the Government.

As stated in your letter of June 9, a conflict of interest question exists with regard to the following situations:

- -- Charles P. Landt, a Presidentially-appointed FNMA board member, is President of Cameron-Brown Company which (1) owns 6,969 shares of FNMA stock, and (2) was paid $273,931 during 1969 for servicing FNMA home mortgages.
- -- Julian H. Zimmerman, a Presidentially-appointed FNMA board member, is President of Lumberman's Investment Corporation which (1) owns 2,442 shares of FNMA stock, and (2) was paid $237,279 during 1969 for servicing FNMA mortgages.
- -- Lloyd E. Clark, a Presidentially-appointed FNMA board member, is President of Aledex Corporation which, through subsidiaries, own 266 shares of FNMA stock.

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3. A "special Government employee" is defined as an officer or employee who serves for not to exceed 130 days during any 365-day period under a temporary appointment either on a full-time or intermittent basis. The members of the FNMA board of directors serve under one year appointments (these are generally regarded a temporary for civil service purposes) and their service is intermittent.

-- Lucius D. Clay, an elected board member, is a senior partner in Lehman Brothers which is the sole owner of Lehman Commercial Paper, Inc., which was paid $245,233 during 1969 to market FNMA short-term discount notes.

The fact that some members of the FNMA board of directors are officers in private business concerns that earn substantial amounts by servicing FNMA mortgages or by marketing FNMA short-term discount notes establishes a conflict of interest under the standards set out in Executive Order 11222 and 5 CFR Part 735. While we are without jurisdiction to make conflicts interpretations under the criminal code (that is reserved to the Department of Justice), there is every reason to believe that if the payments described were continued there would be an obligation under 28 U.S.C. 535 to refer the matters to the Attorney General as information indicating a violation of 18 U.S.C. 208.

The above conclusions are based on the fact that FNMA board members control not only the general policies of the corporation but the officers of the corporation who arrange the business relationships with the private business concerns in which these board members hold positions. The financial-gain facet of such an arrangement is obvious and appearance of using public office for private gain is one that could very well adversely affect the confidence of the public in the integrity of the Government. We hasten to add that none of the foregoing implies intentional wrongdoing on the part of any individual. This is a case, as is so frequently the case in the area of ethical conduct, in which the conflict situation is created with no wrongful intent but the fact of its existence and its appearance are as damaging as though malice were present.

The ownership of FNMA by private business concerns in which some FNMA board members hold offices is far less serious than the direct financial profit situation discussed above. While one could argue that it is common place for members of private corporations to own stock in the corporation in which they serve the situation in Government is different. Using the rationale in 18 U.S.C 208, if the FNMA board members take any action in that capacity which affects the financial interests of the private business concerns in which they hold office, they may be in technical violation of the statute. Needless to say, as those private business concerns own FNMA stock the board members' official actions can not do other than affect the financial interests of those private concerns which are FNMA stockholders. Accordingly, the stock-holding matter is also contrary to the standards in the Executive order and 5 CFR Chapter 735.

I hope the foregoing will aid in clarifying the conflicts questions you have. If I can be of further assistance please let me know.

Sincerely yours,

Karl Ruediger
Assistant General Counsel

Senator **Metzenbaum**. And I want to say to the chairman and to Mr. Unger that I am making every possible effort to obtain the 1967, 1968, and 1969 returns as well as when the first notice that you received with respect to the tax matter—because it is my understanding that you do not have copies of them, and so far we have been unable to obtain them from the IRS.

Mr. **Unger**. I do have now; I have found copies through my lawyers of my 1968 return as amended.

Senator **Metzenbaum**. Well, how about the original before the amendment?

Mr. **Unger**. Yes, yes. The return as amended——

Senator **Metzenbaum**. That is not what I am really asking you.

Senator **Hatch**. Are you willing to submit copies of those to the committee?

Mr. **Unger**. Yes, sir.

Senator **Metzenbaum**. Do you have the original return?

Mr. **Unger**. No, sir, I do not have the original return. I sent it to the IRS.

Senator **Metzenbaum**. No, I do not mean that; I mean the unamended return.

Mr. **Unger**. Yes, sir.

Senator **Metzenbaum**. You have that, and therefore we would—you are prepared to present us with two returns. One is the unamended return, and one is the amended return.

Mr. **Unger**. Yes, sir.

Senator **Metzenbaum**. All right. Now, then coming back to the point that you were saying that you discovered it, let me read you from this document: "During the month of August"—the IRS document.

> During the month of August 1968, while the examining officer was examining the returns of some other corporate taxpayers, it came to light that $40,000 was paid to the taxpayer for a right to acquire one-third of all the outstanding common stock of Motion Talking Picture Service, Inc., a Delaware corporation, for the sum of $27 per share. These amounts were subsequently paid during the month of June 1968.
>
> Subsequent examination of taxpayer's return for the year 1968 disclosed that the $40,000 was not reported by the taxpayer in the year under consideration.

Now, you are saying that you discovered it. They are saying they discovered it, and they have no mention at all that you ever brought it to their attention.

Now, would you clarify that for us.

Mr. **Unger**. Yes, sir. I think a fair reading of what I understand you just to have said is that in August 1968 the IRS was auditing somebody and discovered that I had been paid $40,000 for the sale of rights and that they subsequently discovered in 1968 that I did not reveal it and put it in my return.

I do not think that statement goes beyond that, Senator.

Senator **Metzenbaum**. Well, let me—"While the intelligence division was considering the case, the taxpayer filed an amended return on which he included the $40,000 as income, less expenses, and paid an additional tax of $16,988.99."

Now, is that not contrary to what you said, because while you said that—I think you indicate—one moment, please. You said that on December 16—that you did your return on April 15, 1969, and in January 1979 I revealed that to Paul Eggers.

Mr. UNGER. Yes, sir, that is correct. I have Mr. Eggers affidavit. I will submit if for the record.

May I read one paragraph——

Senator METZENBAUM. That is what I am trying to point out to you, Mr. Unger, that the Internal Revenue Service says their examining officer found it during the month of August 1968.

Mr. UNGER. The taxes were not due then, Senator.

Senator METZENBAUM. Well, then it would have to mean in August 1969, if there was any mistake. I am reading from the IRS report.

Mr. UNGER. Well, sir, the taxes were not due in 1968.

Senator METZENBAUM. That is correct. It could have been an error and be 1969. But it certainly could not have been 1970 because——

Mr. UNGER. But nobody—there is nothing that you have read that said they conveyed that information to me.

Senator METZENBAUM. Oh.

Senator SPECTER. Did they?

Mr. UNGER. No, not until after I filed my return, my amended return.

The actual audit did not commence, Senator, until probably July 1970.

Senator METZENBAUM. Did you not just say that somebody contacted you in March of——

Mr. UNGER. Wrote a letter, yes, sir. I am talking about when the actual audit started, the first time we got together, the first time I gave the auditor any papers.

Senator METZENBAUM. So that they did contact you before you filed anything.

Mr. UNGER. I got a letter—yes, sir, that is true. They contacted me before I filed it, but I revealed it before I got their letter.

May I read from Mr. Eggers' affidavit, one paragraph?

Senator METZENBAUM. Well, no. I would like Mr. Eggers to come here, if he wants to testify. I do not think this hearing should be conducted on the basis of affidavits. If people wish to be heard, I think we have a right to interrogate them. If Mr. Eggers is here, let us put him on the stand.

Mr. UNGER. Mr. Eggers is in the hospital. This was an affidavit written in 1970, which is contemporaneous with the event, and I think is more valuable.

Senator HATCH. Without objection we will put it in the record.

[Material referred to follows:]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

October 17, 1983

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Attention: Robert J. Short

Dear Mr. Chairman:

In Re: Eggers Affidavit

At page 135 of the transcript of my October 5, 1983 hearing, Senator Specter expressed an interest in the form of the Eggers Affidavit which was presented to the Committee, which was in fact a conformed copy. I now have obtained an October 14, 1983 affidavit from Mr. Eggers in which he provides that he has reviewed the affidavit of September 14, 1970 and the facts stated therein are correct and that he remembers executing the original affidavit.

A copy of both affidavits are attached hereto. I respectfully request that this letter and the affidavits attached hereto be placed in the hearing record.

Very sincerely,

Sherman E. Unger

Sherman E. Unger

cc: Honorable Orrin G. Hatch
Honorable Arlen Specter
Honorable Howard Metzenbaum
Fred F. Fielding, Esq.
Jonathan C. Rose, Esq.

AFFIDAVIT

THE STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned notary public, on this day personally appeared Paul W. Eggers who, being by me duly sworn, upon his oath says:

My name is Paul W. Eggers. I am a resident of Dallas, Texas, and am President of Eggers & Greene, A Professional Corporation. I am a member of the State Bar of Texas, having been admitted as a member in 1948.

I have carefully reviewed the Affidavit, a copy of which is attached hereto, which I executed September 14, 1970. The facts stated therein are true and correct and I remember executing the Affidavit which is attached hereto.

Paul W. Eggers
Paul W. Eggers

SUBSCRIBED AND SWORN TO before me this 14th day of October 1983.

May W. Logan
May W. Logan
Notary Public in the State of Texas

My Commission Expires:
November 30, 1984

September 14, 1970

AFFIDAVIT

My name is Paul W. Eggers. I am a resident of Wichita Falls, Texas, and a member of the State Bar of Texas, having been admitted as a member in 1948. Most of my practice was in the field of Federal Taxation and I have been past Chairman of the Tax Section, State Bar of Texas. On April 1, 1969, I was appointed by the President of the United States as General Counsel of Treasury, which position I resigned on March 20, 1970. Presently I am the Republican Candidate for Governor of the State of Texas.

While I was in Washington I became acquainted with Sherman Unger, who was General Counsel of HUD. In December, 1969, Mr. Unger called me at my office in Treasury inquiring about the tax aspects of the new Capital Gains provisions of the 1969 Tax Reform Act. He stated he was negotiating on a sale of Capital stocks. I referred him to another office for this information.

In January, 1970, we attended a reception at the Federal Bar Building for Justice Tom Clark. Mr. Unger did not have a car and I offered to take him home. We stopped on the way home at a club. During the course of visiting, I asked Mr. Unger if he obtained the information he needed on the tax law. In the course of our conversation he told me that he had discovered that he failed to include some income from a sale in his tax return, which he had filed at the last moment on April 15, 1969. He did not state the amount or type of transaction. I advised him to file an amended return and include a letter of explanation stating the facts as to the reason for the oversight. Shortly after talking to Mr. Unger about his omission of income, I advised Mr. Martin Worthy, Chief Counsel of the Internal Revenue Service, of the fact that Mr. Unger had told me about his omission and that I had advised him to file an amended return. Mr. Worthy, as I remember, agreed that my decision was correct.

/s/ Paul W. Eggers

STATE OF TEXAS

COUNTY OF TARRANT

Sworn and subscribed to before me a Notary Public in and for the County of Tarrant, State of Texas, on the 14th day of September, 1970.

/s/ Dorothy R. Dutton

Senator METZENBAUM. Let me ask you, how come this just came up today? Did you forget about it last week?

Mr. UNGER. How come what came up?

Senator METZENBAUM. About your contact with Mr. Eggers and the fact you had an affidavit. Had you forgotten that last week with respect to those questions?

Mr. UNGER. Senator, I did not—yes. You know, that is 12, 13 years ago. I was not prepared for the issue. I did not have the records. I spent the last 48 hours digging around trying to find records to refresh my memory.

Senator HATCH. Let us let you explain this issue. It was just raised last week, as I understand it, and it was raised at that hearing.

So let us let you know finish, and then we will be happy to have any cross-examination anybody wants to make.

But, as I understand it, last week you testified from your recollection.

Mr. UNGER. That is correct, sir.

Senator HATCH. You are saying your recollection was faulty now that you have the documents before you.

Mr. UNGER. That is correct.

Senator HATCH. And you are saying last week you were not prepared for this particular problem.

Mr. UNGER. Not only was I not prepared, I had forgotten about Mr. Eggers' affidavit.

Senator HATCH. And the ABA did not make this one of their allegations because they did not know about the $40,000.

Mr. UNGER. The only question I had from the ABA was what was the cause of my withdrawing from the FCC? What was the tax problem that caused me to withdraw from the FCC?

Senator HATCH. OK. Now, let us get these facts straightened out so that we all know where we are going. So, the ABA had not made this as one of their allegations. It came up during the course of these proceedings.

Mr. UNGER. That is correct.

Senator HATCH. And what you decided to do was to be more sure of your facts by going back and getting your former tax counsel to dig into their records of what, 15 years ago?

Mr. UNGER. At least 12 to 13 years ago, yes, sir.

Senator HATCH. OK. You had them dig into those records and find the original documents, and now you are testifying from those original documents, is that correct?

Mr. UNGER. That is correct.

Senator HATCH. And as I understand it, you are testifying from documents that you recollect now.

Mr. UNGER. My recollection has been refreshed substantially by the documents.

Senator HATCH. And what you are trying to do is clear up any misunderstandings or any difficulties that may have occurred as a result of the question that was raised last week, is that correct?

Mr. UNGER. Yes, sir.

Senator HATCH. Now, I want you to clear it up and let us give you the courtesy of explaining what the problem is, what really happened, and then we will be happy to have some more questions.

Senator METZENBAUM. Mr. Chairman, may I respectfully ask you a question? I do not want to interrupt.

Senator HATCH. Sure.

Senator METZENBAUM. But last week we sat here for several hours and none of us got an opportunity to interrogate the witness. We have now been here almost 2 hours. You have not allowed any of us, except to interject a question here and there, to have a line of questioning. I would guess that Senator Specter has questions, and I do. I asked your staffer 1 hour ago how much more you had and he said 5 minutes.

I know that he does not appreciate Senators' long-windedness. But the fact is, when are you going to give us that chance?

Senator HATCH. I think he does now, Senator.

Senator METZENBAUM. When are you going to give us a chance to interrogate this witness?

Senator HATCH. Well, as soon as we are through, as soon as he has an opportunity of explaining his position, then we are going to give you all the time you need.

But, you know, one of the things that I have found to be very unfair in this proceeding—and I think it has been very unfair—is that we have had 2 days prior to today and he has never been able to rebut these accusations that have been made.

Now, what I want to do, as chairman of this proceeding, is to finish these accusations. I want Mr. Unger to have a fair chance to rebut them.

Now, we are going to bring other witnesses on after you have had an opportunity to cross-examine Mr. Unger, after Senator Specter has had an opportunity to ask every question that he has or any other member of this committee.

So, we will have plenty of time, and I know it takes patience. But I want to be fair to Mr. Unger. We are also going to be fair to these other witnesses. There are other witnesses who differ with Mr. Unger, and we are going to let them testify, and all of us will have an opportunity to interrogate them. We are certainly going to be fair to Mr. Coleman who has put in an awful lot of time voluntarily for the ABA in this matter and allow him the opportunity of rebutting anything Mr. Unger says here today.

But one thing we are going to do right now is we are going to let Mr. Unger explain. As I take it, Mr. Unger, you have not felt very good about not being able to get your answers on the record while major journalistic articles are being written basically from one side of this issue.

Senator METZENBAUM. How long does the chair expect——

Mr. UNGER. I agree with you, Senator. I appreciate the opportunity to respond.

Senator METZENBAUM. Normally, Mr. Chairman, we do shift back and forth.

Senator HATCH. Well, not until the chair is through.

Senator METZENBAUM. Tell me what other committees do that, Mr. Chairman.

Senator HATCH. Well, the Labor and Human Resources Committee does that.

Senator METZENBAUM. Yes, but you are chairman of that place. But the fact is——

[Laughter.]

Senator HATCH. That is right. Howard, when you become chairman, I expect you will run the committee the way you want to.

Senator METZENBAUM. In 1984 we will be there.

Senator HATCH. We will see. Go ahead.

Senator METZENBAUM. The fact is, Mr. Chairman, no committees really conduct themselves in this manner. They do provide other members of the committee to have an opportunity to interrogate. Now, you have had the opportunity to interrogate for about 5 or 6 hours.

Senator HATCH. No, 2 hours. You have interrupted all the way through, and I have let you do it. That does not happen very often in other committees either.

Mr. Unger, we are going to be fair to you this time. We are going to let you answer these questions then we will give good ol' Senator Metzenbaum all the time he wants. And I suppose you will have to answer him.

Senator METZENBAUM. What about good ol' Specter, can he have some too?

Senator HATCH. Well, I will go to Arlen first if we keep it up. But go ahead, Mr. Unger.

Mr. UNGER. I did—I do have an affidavit from Mr. Eggers to the effect that I did tell him in January 1970 that I had discovered that I had missed a payment in my 1968 return. He in turn in this—if I could just read one paragraph from it.

Senator SPECTER. May we see the affidavit, please?

Mr. UNGER. Yes, sir. It is the only copy because it just came in.

Senator SPECTER. Let us make copies so we can follow what is happening, please.

Senator METZENBAUM. Why did he give you an affidavit in 1970? What was he doing that for, to prepare for this hearing?

I do not understand that. Why would you go and tell a man at the IRS I overlooked some income. I want to tell you about it. And he then gives you an affaidavit and says, oh, yes, let me give you an affidavit telling you that I know that you overlooked some income in January 1970. I do not follow that. Why did he do that?

Mr. UNGER. As the Senator has repeatedly pointed out, some time in July of 1970 an intelligence agent came in and I asked Mr. Eggers if he would prepare the affidavit to give to the intelligence agent, which he did.

Senator SPECTER. Mr. Chairman, could we ask Mr. Unger to provide us with copies of all the documents he is going to use so that we can try to follow along with his testimony?

Senator HATCH. It would be helpful, Mr. Unger, if you could do that.

Senator SPECTER. Whatever documents he intends to use in illustrating his testimony so that we can review them and try to expedite what we are about.

Mr. UNGER. I am trying to figure out a way to accommodate the Senator and finish my testimony. Some of these papers just got here today.

Senator HATCH. You only have one set of papers?

Mr. UNGER. I have Xeroxes of a number of things, and I will be glad—I have Xeroxes of my 1968 return.

Senator SPECTER. Mr. Chairman, if Mr. Unger just got those papers today, there may be a question as to whether he is prepared to proceed. I, for one, am very much concerned about his testimony last Wednesday or Thursday when he testified at length about receiving a $40,000 legal fee, and then buying stock with it. To say that he did not know what the transaction was 12 or 13 years ago, I can understand, but I cannot understand extensive testimony last week as if you knew what you were testifying about.

Mr. UNGER. I was testifying from the best of my memory, Senator.

Senator SPECTER. But either you have a memory or you do not. Now, if you do not remember something that happened 12 year ago that is fine. I can understand that. But I frankly cannot understand extensive testimony under oath telling us what happened when you had no recollection, as you are testifying today.

Mr. UNGER. I gave you my recollection. I had forgotten that I had revealed this——

Senator SPECTER. Mr. Unger, what I am concerned about is that you have a pile of papers in front of you, about which you are testifying. You just got the papers, and we may spend more time going-back over what you are testifying about today. The chairman is trying to be fair with you and this committee wants to be fair with you.

If I were your counsel, I would not let you testify about papers that you had not reviewed. Have you reviewed——

Mr. UNGER. I have reviewed them.

Senator HATCH. Do you feel that you are prepared?

Mr. UNGER. I just have not made a series of copies. I would rather not testify from memory. If I can testify from my papers, I will make them available for copying immediately thereafter.

Senator HATCH. Senator Specter. Do you feel that it is essential for you to have these papers to review while he is testifying?

Senator SPECTER. I do not understand what Mr. Unger is saying. I would like to have copies of all the papers that he is testifying from so that I can follow his testimony. A moment ago I understood him to say that he was not prepared to turn over the papers because he had not had a chance to review them.

Mr. UNGER. No. If I can testify from them, I cannot give them to you at the same time. I will make them available to you.

But can we get these copied while we go on to another subject and then come back?

Senator HATCH. If you would like to have them to go through during testimony, we will get staff to go out and copy them. Otherwise, you can testify to them, and——

Senator SPECTER. Well, Mr. Chairman, we just got the affidavit of September 14. While he is being questioned on that, which is likely not to take a brief period of time——

Mr. UNGER. Could I give you some other papers?

Senator SPECTER. If you have the others photostated, then we can proceed in an orderly way.

Senator HATCH. Every document you intend to use, Mr. Unger, let us have staff get those xeroxed and then we can have three copies. If any other Senators come in, we will provide copies to them as well.

Let us understand something. This is an important hearing, and we are going to show dignity here, and we are going to show dignity to this man and to all of the other witnesses. If we are going to have snickering and other types of undignified conduct, we will clear the room.

This important hearing is one that involves one of the most important judicial posts in this country. Mr. Unger has not had the opportunity to explain these problems.

Here is a man whose reputation is at stake and we are going to show some interest in that. So we are not going to have any more partisanship here either way. Let us just let the record speak for itself.

We have had some amazing testimony in this matter, and we have also had a number of very interesting witnesses. We are going to finish it, and we are going to do it the best we can. We are going to give everybody an opportunity to ask all the questions they want, and we are going to treat everybody with dignity.

So let us make sure that that is so throughout this room. It includes everybody concerned.

Mr. Unger, let us talk about this affidavit. We have it in front of us. Say what you care to say about it.

Mr. UNGER. Well, the affidavit—I gave to the staff some papers that I did make available to the committee and to Senator Specter on the 30th of September, which includes the protest that I had available, and the settlement papers. So there may be some repetition.

Senator HATCH. Are these the papers from which you are going to testify or give testimony here today?

Mr. UNGER. I am prepared to go forward. I got the Eggers affidavit on whatever date it was executed, showing——

Senator HATCH. We have the affidavit.

Mr. UNGER. All right. showing that I had revealed to him in January 1970 that I had found this lack of payment in 1968.

Senator HATCH. Go ahead.

Mr. UNGER. I have given you the opinion of Silverstein and Mullens that I met with them on April 2, and their advice was that there was——

Senator SPECTER. Do we have a copy of that opinion?

Senator HATCH. I think you do have a copy.

Mr. UNGER. The staff has it, sir; I do not.

Senator METZENBAUM. Mr. Unger, while you are responding to Chairman Hatch about the fact that you forgot about this item, would you be good enough to comment as well on the fact that last week it was a $40,000 fee; this week it is a $40,000 sale. And you indicated that your memory was hazy. But I would appreciate it if you would comment on the fact that when you made this deal the evidence I had indicated that you had very little resources. And this was a deal that if it would have been—for example, said the IRS, "If MTS, Inc. would have been successful in going public, the taxpayer stood to gain between $1.5 and $2 million on his $30,000 investment, according to speculation of the underwriters, projected the MTPS, Inc. stock as selling between $12 to $16 per share."

Now, my point is, this was undoubtedly the biggest deal that you had ever been involved in because at another point the IRS talks about the fact that you did not have the wherewithal to make this purchase so you went to two other people and they put up the money.

Now, under those circumstances, I have difficulty in comprehending your inability to remember and to have this as the most important deal of your lifetime up to that time, I would guess, although I do not know much about your background. But from what I have read in various places, it would appear to be.

I am having difficulty in comprehending a deal that might have made you $1.5 to $2 million—and it did not—but it just seems to have a hazy background for you; that is a pertty big deal for anybody.

Mr. UNGER. Senator, I am testifying from memory. I do not have the IRS report. But I suspect that what you are quoting from is the auditor's initial writeup projecting how much I might have made justifying the constructive income claim, which, as it turns out, was dropped totally by the Internal Revenue Service at the time that the deal——

Senator METZENBAUM. No; it was not totally dropped, sir. If you look at your own return, it was settled for a far less amount of money, but it was not totally dropped, because in your amended return you did report some income from that transaction, not much, and it is fair to say in all candor, you are right that it was mostly dropped, but I believe it shows that—I will find your tax return.

Senator HATCH. Are you talking about the $40,000 or the——

Senator METZENBAUM. The 136 or the 176, that was pretty much dropped. But in the——

Senator HATCH. He admitted he paid about $3,000 here.

Senator METZENBAUM. Yes, but on the settlement document, it talks about other property received in an exchange under section 351, recognized to its value, and I cannot read all of it, holding period over 6 months, and it indicates that you did have some income, not much.

Mr. UNGER. I do not have that paper in front of me, Senator, but the paper that I think you have is the final settlement document. And if you will look under the 136, does it say withdrawn.

Senator METZENBAUM. No. Let me show you what I am reading from so that—I do not wish——

Senator SPECTER. Here.

Senator METZENBAUM. Would staff——

Senator HATCH. Take that down.

Senator METZENBAUM. I think you submitted that. That is your document.

Senator HATCH. What page are you referring to, Howard?

Senator METZENBAUM. I am not sure that it has a page number.

Mr. UNGER. Yes, sir; it is a form 3611 which calculated the final settlement. What it says when it refers—I used the wrong word. My memory was incorrect. It says, "eliminated." They eliminated the whole $136,000 claim and then substituted another property item, which resulted in $5,000 worth of taxes, which ultimately caused a $3,000 payment.

Senator METZENBAUM. So that you paid a capital gains on the $11,250.

Mr. UNGER. Yes, sir.

Senator METZENBAUM. And you reported as income $40,000 more from the fee?

Mr. UNGER. Yes, sir, much earlier. I did that on May 19.

Senator METZENBAUM. It is not correct, Mr. Unger, that you did not report it as a capital gain, the $40,000, but you reported it as normal income?

Mr. UNGER. Yes, sir.

Senator METZENBAUM. So that when you said——

Mr. UNGER. It was a short term normal income. It was not earned income.

Senator METZENBAUM. Was it short term?

Mr. UNGER. Yes, sir.

Senator METZENBAUM. If I may see your return. May I see your——

Mr. UNGER. I think they are copying them now, sir.

Senator METZENBAUM. All right. Thank you.

Senator HATCH. Why do you not proceed, Mr. Unger. You were at the point in your testimony of your affidavit from Paul W. Eggers. I notice that you provided us a copy. It does not actually have his signature on it.

Do you know where the original would be?

Mr. UNGER. Probably with the IRS.

Senator HATCH. OK. How did you get ahold of this affidavit?

Mr. UNGER. From my tax counsel in Cincinnati. It was in their file.

Senator HATCH. Well, go ahead.

Senator METZENBAUM. Did you not tell us the other day you did not have a copy of your 1968 return?

Mr. UNGER. I did not. I got it from my——

Senator METZENBAUM. Did you not say you did not know where to find it, and then you went to your tax counsel?

Mr. UNGER. I called Arthur Anderson first. Arthur Anderson told me for the first time that they had a record destruction policy, that they destroy returns after 8 years. I did not know that until Friday.

At that point I started calling my former tax counsel on this case because I knew that the Senator was interested. I asked them what they had. One of them had a copy of the 1968 return and the amended.

Senator METZENBAUM. Up until that time you had not seen fit to call them? Mr. Unger?

Mr. UNGER. You had only raised the issue the day before.

Senator METZENBAUM. Well, you did not think that the $40,000 item would become an issue in this hearing?

Mr. UNGER. It had not been raised before, Senator.

Senator METZENBAUM. You had not disclosed the fact to the ABA on their form. And I think you did make some reference to the problem with the IRS, did you not, in connection with your form for the committee?

Mr. UNGER. Yes, sir; I was asked why I withdrew my nomination from the FCC, and I said I had an IRS issue still pending of $136—I think I misstated that and said $166, if you will look at the letters—

of constructive income. That was the sole issue that was pending at that time.

The other issue had been covered by the amended return much earlier.

If I may try to wind up on this point. The amended return was filed on May 20, 1970. On July 21, I advised the White House I would accept an FCC nomination, which was subsequently made. On July 22, the Cincinnati Inquirer carried a speculative story concerning my nomination.

And if I understand it correctly, it was 2 days later before the auditor had seen any of my papers or seen me or done anything else. The Intelligence Division was, in fact, called in. There was a meeting with the Intelligence Division on August 5 with Mr. Leonard Silverstein, the agent whose name is now Frank Coots, and I presume he is alive and available, but I do not know that.

Coots advised us that he had gotten the case only the day before. That would be August 4. Thereafter there were some meetings with my former law firm and Mr. Coots. On August 21, some 2 or 3 weeks later, Mr. Coots returned all my papers, and on Friday, August—on Tuesday, August 25, Mr. Coots signed a report, presumably recommending no action.

Thereafter, the sole issue that we had was the issue of the constructive income, the amended return having been filed last May. I tried during that period to see if there was any way of resolving that constructive income issue. This in my whole life is the only case I had to take up one administrative level. It was not in court. It was not in tax court. It was not in district court. It was not in the Court of Claims.

We took it up one administrative level to the appellate level, filed a protest, a copy of which I think has now been made available to you or will be. And ultimately, as the piece of paper that you showed me, that claim was eliminated, a small capital gains substituted, and I paid $3,000-plus.

Senator METZENBAUM. Well, as a matter of fact, you keep talking about constructive income. How do you define "constructive income"?

Mr. UNGER. I have grave difficulty with the concept. It was the auditor's concept. Perhaps that is——

Senator METZENBAUM. How do you define it?

Mr. UNGER. Perhaps that is why we won.

Senator METZENBAUM. How do you define "constructive income"?

Mr. UNGER. I am not too sure that I can give you a definition of constructive income. You either have income or you do not have income.

Senator METZENBAUM. Well, you did have a check for $40,000, did you not?

Mr. UNGER. I think I had two checks.

Senator METZENBAUM. Pardon?

Mr. UNGER. I think it was probably two checks for 20, but something like that, yes, sir.

Senator METZENBAUM. That was not constructive income, was it?

Mr. UNGER. No, sir.

Senator METZENBAUM. That was income.

Mr. UNGER. Yes, sir, and I paid tax on it. I just paid it late.

Senator METZENBAUM. I will come back to that later.

Senator HATCH. What I have been trying to do now for three hearings is to let Mr. Unger explain to this committee anything about these two tax issues that have been raised. So I would appreciate it, Mr. Unger, if you could just explain that.

Mr. UNGER. I would just like to wind up and say that my Washington tax counsel said that I had an argument that I could make that the $40,000 was not income, and I thought I was bending over backward to file the amended return and be fair.

I would also like to say that ultimately I paid $3,000 on—I gave to the staff the theory advanced by my Cincinnati counsel, how they could substitute all of this to dispose of it for a very nominal figure, and obviously the IRS accepted it. There was no civil fraud penalty. There was no criminal fraud penalty. There was a negligence penalty of 5 percent.

There was no intent to do anything wrong. There was no intent to dodge. I did not try to duck anything. I did reveal it early. I did file the amended return voluntarily. There had been no meeting with the auditor before the return was filed.

Senator HATCH. There are two issues that have been raised, as I understand it. One was the constructive income issue. That involved a total of approximately over $100,000?

Mr. UNGER. Yes, sir.

Senator HATCH. How much was it?

Mr. UNGER. The claim was for $136,000—$136,000 of income.

Senator HATCH. The auditor claimed that you had constructive income of that much money.

Mr. UNGER. That is right, because of an upstream merger, she said that it was income even though I did not get anything.

Senator HATCH. Am I correct in assuming that you and your tax counsel contested that?

Mr. UNGER. Yes, sir. We filed a protest and a copy has been made available.

Senator HATCH. And you met with the IRS and you resolved it for $3,000; is that correct, or thereabouts?

Mr. UNGER. $3,023 plus a 5-percent penalty, I believe that is correct.

Senator HATCH. All right. And what you said last week still stands, that that was a de minimus settlement for a claim of some $130,000?

Mr. UNGER. Yes, sir, I think it is.

Senator HATCH. And that was resolved, correct?

Mr. UNGER. Yes, sir.

Senator HATCH. To the satisfaction of the IRS?

Mr. UNGER. Yes, sir.

Senator HATCH. To your satisfaction?

Mr. UNGER. To my satisfaction?

Senator HATCH. OK.

Now, the second issue, as I understand it, is the $40,000 real income issue or should I say actual income issue.

Mr. UNGER. Either way.

Senator HATCH. OK. Now, you have testified here as to how you got the $40,000. Senator Metzenbaum has read from the IRS memorandum indicating that you used that money to purchase stock at approximately $27 a share. Is that correct?

Mr. UNGER. I think used—and it is in the protest—I used $30,000 of it to buy the stock.

Senator HATCH. OK. The fact is that sometime after January 1, 1970, you recognized, by going over your records before the IRS contacted you, that you had not paid taxes on this $40,000.

Mr. UNGER. That is correct.

Senator HATCH. Then you then filed an amended return?

Mr. UNGER. That is correct.

Senator HATCH. And you paid the taxes which approximated less than $17,000?

Mr. UNGER. That is correct.

Senator HATCH. There was not a real issue up to that point, am I correct?

Mr. UNGER. That is correct.

Senator HATCH. But when you filed the amended return, you filed it late; is that correct?

Mr. UNGER. Well, sir, an amended return is generally late. It is out of time.

Senator HATCH. So it goes without saying that you filed it late.

Mr. UNGER. Yes; it was late.

Senator HATCH. So it goes without saying that you filed it late.

Mr. UNGER. Yes, it was late.

Senator HATCH. Was the amount you paid for your income taxes on that $40,000 or whatever else was involved there, accepted by the IRS?

Mr. UNGER. Yes, it was.

Senator HATCH. Was this issue resolved, then?

Mr. UNGER. Yes, it was.

Senator HATCH. Have you had any difficulties with the IRS since that day?

Mr. UNGER. I have been audited probably almost every year since. There have been adjustments. Most of the adjustments have been made from partnership returns where somebody else does the return and there is an adjustment on it, a deduction or something; no major problems. There has been nothing that has not been resolved at the auditor level since that time.

This is the only IRS matter I have ever had that had to even go to the appellate level.

Senator HATCH. All right. As I understand it, you are saying there has not been a difficulty since that date, and that as far as you are concerned, both of these matters have been completely closed to the satisfaction of the Government of the United States of America.

Mr. UNGER. Yes, sir.

Senator HATCH. Or the IRS, the agency in charge.

Mr. UNGER. Yes. Since December 28, 1971, I believe.

Senator HATCH. Approximately 12 years ago.

Mr. UNGER. Yes, sir.

Senator HATCH. And they were both resolved to your satisfaction as well; is that correct?

Mr. UNGER. Yes, sir. I—and you will see Silverstein and Mullens letter. When I discovered it, they advanced a theory that it might not be; I said, let us pay it. Yes, I was satisfied.

Senator SPECTER. There is yet another reference to a document that I have been trying to get for the last half hour.

Senator HATCH. As I understand it, they are xeroxing them now.

Senator SPECTER. No, nobody can find the document.

Mr. UNGER. Which document, sir?

Senator SPECTER. The Silverstein and Mullens letter.

Mr. UNGER. I turned it over to the committee.

Senator HATCH. Where is the Silverstein and Mullens opinion? Let us get that to Senator Specter.

Mr. UNGER. I believe it is a September 15 letter referring to an April 2 meeting. The letter is from Mr. Silverstein to Mr. Williams Seaman in Cincinnati.

Senator SPECTER. I have never said it.

Senator HATCH. We will look for it and see if we can find it. Let me just finish this. I want to resolve this problem. Did the intelligence division commend to the $136,000 constructive income problem?

Mr. UNGER. Yes, sir.

Senator HATCH. They got involved in that. Did they get involved in the $40,000 problem, to your knowlege?

Mr. UNGER. I am not too sure what they got involved in. I know I turned over everything to them.

Senator HATCH. I am reading from, I think, the same statement that Senator Metzenbaum was reading from, the supplement to the IRS report of November 15, 1971.

Mr. UNGER. November 15?

Senator HATCH. Yes. It says, "Attached is a copy of a supporting statement concerning the tax matters of this individual. This case was settled on December 28, 1971." Does that coincide with when you think it was settled?

Mr. UNGER. Yes, sir.

Senator METZENBAUM. What were you reading from?

Senator HATCH. I am reading from what I thought was the same thing you were reading from, Howard.

Senator METZENBAUM. What date?

Senator HATCH. I have a cover sheet and then it starts with page 1.

Senator METZENBAUM. It says issues at the top?

Senator HATCH. It says issues at the top.

Senator METZENBAUM. That is January 13, 1972.

Senator HATCH. I do not have a date on it, but whenever.

Mr. UNGER. Is there a form number on it, sir?

Senator HATCH. This is just an accompanying, supporting statement. It is called supporting statement in the upper righthand corner. And it is regarding Sherman E. and Polly Unger.

Now, Senator Metzenbaum did read from part of this with regard to the $40,000. It does say here on page 2 beginning at the top:

> Because of the omission of the income as determined by the district director, the case was referred to the intelligence division of the office of the district director, which branch, after thorough investigation and study, withdrew from the case and recommended that prosecution not be instituted.

Mr. UNGER. I have not seen that document.

Senator HATCH. You have not seen that because as far as you were concerned you did not know that they were even looking into this matter.

Mr. UNGER. I am sorry. I could not hear you, Senator.

Senator HATCH. As far as you were concerned, you did not know that they were looking at this matter?

Mr. UNGER. I knew they were looking at it when I was notified by the White House on July 28 that the intelligence division had been called in. As I pointed out, my nomination was in the paper on July 22. The intelligence division was called in 2 days later, and I had never seen the auditor.

Senator METZENBAUM. Would the chairman like to read the next paragraph?

Senator HATCH. Yes; I will go to the next paragraph.

> While the intelligence division was considering the case, the taxpayer filed an amended return in which he included the $40,000 as income less expenses and paid an additional tax of $16,988.99.

And the next paragraph:

> Upon further audit examination, after the intelligence division withdrew from the case, the office of the district director determined that the taxpayer realized income from services to coinvestors in the same transaction that gave rise to the $40,000 payment in the amount of $136,660.67

That is the other issue.

Mr. UNGER. Yes.

Senator HATCH. OK.

> As cited below. In addition to the $40,000 item, a finding was made on other small items, and a negligence penalty of 5 percent was proposed on the deficiency along with the tax due, so that at the conclusion of the audit the taxpayer's deficiency on other than the issue in controversy was $20,748.01 in tax and $1,037.40 negligence penalty against which the $16,988.99 was paid on the amended return. Subsequently, the taxpayer paid the balance.

Or in other words, a little over $3,000.

Mr. UNGER. Yes, sir.

Senator HATCH. The reason I have insisted on trying to get through these accusations is because you have sat here for 3 days without being able to answer them.

Mr. UNGER. I appreciate that, Senator.

Senator HATCH. And the only way that you can get this on the record is to answer them. I think it is only fair to you that you are able to tell your story on the record. If we are going to consider these matters, then you ought to have an opportunity to respond.

Is there anything else, Mr. Unger, that you would care to bring up with regard to these tax matters? Can you think of anything else that somebody might raise to indicate that you are not fit to be a judge in the Federal Circuit Court of Appeals?

Mr. UNGER. No, sir. I do not. I think I voluntarily paid the tax that I missed in 1968. There may be a conflict in when the intelligence agent was in, and maybe the FBI report will more specifically——

Senator HATCH. But you were not privy to that.

Mr. UNGER. That, sir, I do not know.

Senator HATCH. All you know is the intelligence division was in it, but they got out of it.

Mr. UNGER. In August. I knew in late July and they left in August.

Senator HATCH. And they withdrew.

Mr. UNGER. Yes; there was no civil fraud penalty. There was no criminal action. There was a 5-percent negligence penalty. Everybody was satisfied. How—I see on the form 1907 they are saying on the 20th of October 1970 you filed an amended return for 1968, May 20, paid additional taxes of $16,988.99. As of this date this additional tax has not been assessed, but stands in your account with us as a credit.

That is how the $20,000 figure was reached for December 28.

Senator HATCH. In your report to the committee on the questionnaire that we send out, you did not report that as a criminal investigation.

Mr. UNGER. That is right.

Senator HATCH. What is the reason? Why did you not?

Mr. UNGER. I had no recollection of a so-called Miranda warning. I knew there was a different agent in there, but I did not realize I was having a criminal investigation.

Senator HATCH. Well, in other words, you did not realize when the intelligence division gets in, that is the criminal division of the IRS that investigates.

Mr. UNGER. No.

Senator HATCH. But in any event, did you consider this to be a criminal problem since it had been resolved?

Mr. UNGER. No.

Senator HATCH. Did you have any indication that the intelligence division came in but withdrew?

Mr. UNGER. Yes, I knew they withdrew.

And I knew that they were there for some 3 weeks, and I knew that they withdrew.

Senator HATCH. Are you saying that although you knew the intelligence division had come into this matter and had looked at both of these items, the fact that they withdrew indicated that there was no criminal problem here?

Mr. UNGER. Yes. I am saying that. I am freely saying that there was not even a claim for civil fraud. Now, there is a civil fraud provision that could have been claimed and no one made that claim.

Senator HATCH. I am going to turn to Senator Metzenbaum and give him all the time he needs to ask questions.

But let me try to summarize this fairly. The No. 1 issue was that you had made a suicide threat upon departure from American Financial Corp. You deny that and cite that the issue was raised 6 years after the fact and under strange circumstances.

Mr. UNGER. Yes, sir.

Senator HATCH. No. 2, your termination from HUD: You acknowledge that you had differences of opinion with other leaders at HUD, in particular with your superior.

Mr. UNGER. Yes, sir.

Senator HATCH. OK. And that your pending nomination to the FCC was not withdrawn by the White House. You voluntarily withdrew because you wanted to resolve these problems that we have been describing with the IRS.

Mr. UNGER. That is correct; yes, sir.

Senator **Hatch**. OK. The third allegation was that you filed a false affidavit regarding relationship to a client in a bankruptcy proceeding. You admitted error there, but you said it was unintentional.

Mr. **Unger**. That is correct.

Senator **Hatch**. OK. No harm done. You testified to that. And the client was fully aware of the situation, as was the court and all of the counsel.

Mr. **Unger**. That is correct.

Senator **Hatch**. No. 4, a bankruptcy fee was accepted prior to court approval. As I understand it, you admitted that that was an error.

But it was also unintentional.

Mr. **Unger**. That is correct.

Senator **Hatch**. It was $12,000 out of approximately $1 million in legal fees on that bankruptcy.

Mr. **Unger**. That is correct.

Senator **Hatch**. The client was aware of it. No harm was done, and the court was aware of it.

Mr. **Unger**. That is correct.

Senator **Hatch**. The other attorneys were aware of it.

Mr. **Unger**. That is correct.

Senator **Hatch**. So nobody lost anything. Nobody was cheated. Nobody suffered any detriment as a result of that.

Mr. **Unger**. That is correct.

Senator **Hatch**. OK. No. 5, as I understand it, the accusation was that you were, on occasion, "abusive and intemperate" in court. But your answer has been that you have fought hard for your clients.

Mr. **Unger**. I have.

Senator **Hatch**. But you do not remember being abusive and intemperate. And you cannot rebut allegations where no real specifics are alleged.

Mr. **Unger**. And I point out that I was not sanctioned for my conduct in court and some of my opponents were.

Senator **Hatch**. And you read information to us indicating that those who have been accusing you, at least whose name we know, were the people who were in fact sanctioned rather than you.

Mr. **Unger**. That is correct.

Senator **Hatch**. No. 6, the allegation that you contacted an opposing party directly. And again you say it is hard to rebut because there have been no specifics alleged.

Mr. **Unger**. I have had two cases with that lawyer since 1969. I know it could not have been in those two cases. And I have no idea of any other cases I had with him before then.

Senator **Hatch**. OK. The seventh allegation was that you had ex parte contacts with the court; you acknowledge that you did with Judge Gartner. You contend that the affidavit of his secretary and your own statement that he initiated the contact through his secretary, that she called you and told you to get over there, was the case. He said that you initiated the contact, but that it is possible that his secretary did.

Is that a fair recitation of that?

Mr. **Unger**. If his secretary called me, he asked her to.

I point out to the chairman that I said only 7 days after that administrative conference in court on the record in Wilmington, Del., July 21, 1977, that Judge Gartner called me in for an administrative conference. And that is as close to being the same date as possible. I went on record saying it was an administrative conference.

Senator HATCH. You agree then with Attorney Aug, who has been referred to as the dean of the Bankruptcy Bar in Cincinnati, that the judge did in fact call people on administrative and procedural matters.

Mr. UNGER. Yes, sir.

Senator HATCH. And that this was a common occurrence prior to the 1978 Bankruptcy Reform Amendments.

Mr. UNGER. Yes, sir.

Senator HATCH. The last two, of course, involve these two IRS difficulties, which you say were resolved at the time. And that if the intelligence division got into it, they withdrew.

Mr. UNGER. Very rapidly.

Senator HATCH. And that you settled the one which was $136,000 for a little over $3,000 with penalty, and that you immediately filed an amended return once you examined your basis and recognized you had made the mistake and paid approximately $17,000 on the other.

Mr. UNGER. Yes, sir.

Senator HATCH. The IRS accepted both.

Mr. UNGER. Yes, sir.

Senator HATCH. And resolved the issue with you to the satisfaction of all concerned.

Mr. UNGER. That is correct.

Senator HATCH. Senator Metzenbaum.

Senator METZENBAUM. Mr. Chairman, this man has been on the witness stand for about 2½ hours. And there is a Supreme Court Justice here from Delaware. And I think Mr. Van Dusen is here also.

Senator HATCH. Sure.

Senator METZENBAUM. I think it would be much fairer if we let the Supreme Court Justice speak. I should tell you that the Supreme Court Justice was cocounsel with Mr. Unger in the very controversial matter about which we have been discussing.

Senator HATCH. Do you have any objection to that, Mr. Unger?

Mr. UNGER. No, sir. No, sir. If all of my papers have been copied, may I have a set back?

Senator SPECTER. Do not feel bad; we have not seen them yet.

Senator HATCH. They are still coping them and they will be available for all three of us or anybody else, for that matter.

Senator Specter, may I turn this gravel over to you so I can make that other exigency that I have.

If it is all right with you, then, we will call Mr. Van Dusen at this time and see if we can accommodate these other witnesses. Then we will call you back for any questions that any other Senator on the committee has.

Mr. UNGER. I believe there are two other witnesses that would come after the two witnesses Senator Metzenbaum is referring to, if that is possible.

Senator METZENBAUM. I think the chairman ought to be apprised of the Supreme Court Justice's testimony. He was cocounsel. I think you should particularly know with Mr. Unger in the case with reference to the matter of the ex parte communication.

I believe he is prepared to indicate and confirm——

Senator HATCH. I think it is crucial for me to be here for Mr. Van Dusen's testimony. I will try to get back as quickly as I can. Why do you not start asking Mr. Unger whatever questions you would like. Go as far as you can, and I will try and get back at the earliest convenience.

Senator METZENBAUM. Mr. Unger——

Mr. UNGER. Yes, sir.

Senator METZENBAUM. In answer to a question on the Bar Association questionnaire concerning whether any tax collection procedures had been instituted against you, you answered no.

Do you now feel that that answer was inaccurate?

Mr. UNGER. As I—no, sir, I do not. As I interpret that question, a tax collection procedure would be a tax collection procedure after an assessment like a tax lien—I need to see what I have.

I think you are referring to question 20, and I am trying to find question 20.

Senator METZENBAUM. Yes.

Mr. UNGER. The full-question 20 says, has a tax lien, and there has been no issue of a tax lien, or any other collection procedure ever been instituted against you by a Federal, State, or local authority.

There was no collection procedure, as I understand that. That is a different statute—after an assessment would be made.

Senator METZENBAUM. Pardon?

Mr. UNGER. I believe that is a different statute after an assessment would be made, not while you are discussing with your auditor whether or not it is an amendment or change or an adjustment needs to be made.

Senator METZENBAUM. You do not think that the advice from the Internal Revenue Service that they are ordering returns and are prepared to levy or to make an assessment, a deficiency assessment against you is a collection procedure? You think that what they have to do is to actually indicate they are going to levy upon your property; is that the only way—is that the only thing you would consider——

Mr. UNGER. There was no assessment made. There was a claim of an auditor that was being handled at the administrative level, Senator.

Senator METZENBAUM. You do not consider that——

Mr. UNGER. I believe that is a separate statute. I do not know the citation.

Senator METZENBAUM. Well, regardless of it being a separate statute, they were saying, you owe us some money. And you were saying you do not owe them the money.

Mr. UNGER. And they essentially agreed I didn't owe them the money.

Senator METZENBAUM. Pardon?

Mr. UNGER. And they essentially agreed I did not owe them the money.

Senator METZENBAUM. Well, Mr. Unger, how can you possibly sit there and say they essentially agreed you did not owe them any money when you indeed overlooked $40,000 of income and tell us that that was an oversight on your part?

Mr. UNGER. That was not a collection procedure. That is something that I voluntarily paid before we ever met.

Senator METZENBAUM. Well, the fact is—and I read it to you before and you do not seem to hear me when I read it to you—the fact is that the Internal Revenue Service says that during the course of their investigation of other taxpayers, they came up with this fact. And it was after that that you then made the filing.

Is that not correct?

Mr. UNGER. That is what you are reading to me, Senator, but they do not say they told it to me.

Senator METZENBAUM. On page—on another question they ask you is, have you to your—well, let me just ask you, you mean they did not tell it to you when in March the lady auditor, I think you indicated, sent you a letter. Was that not telling it to you? You did not file your amended return prior to March. You filed your amended return in May. That was telling it to you.

Mr. UNGER. I am sorry, sir. I made the mistake of putting that file away. I will get it out.

Senator METZENBAUM. I do not have copies of those documents at this moment, I might say. And I do not think the acting chairman does.

Mr. SHORT. They are begin xeroxed at this time.

Mr. UNGER. I think my notes indicate that in March of—March 16 a letter was sent to my Cincinnati home, forwarded here, from the auditor, advising that my 1968 income tax return had been assigned to her. That was essentially the statement.

Senator METZENBAUM. Do you have a copy of that?

Mr. UNGER. No, sir, I do not. I don't find that in these files.

Senator METZENBAUM. And did she not indicate in that letter that it was their opinion that there was a deficiency?

Mr. UNGER. My recollection is that is not so.

Senator METZENBAUM. You stated in answer to the bar association question, have you, to your knowledge, ever been under Federal, State, or local investigation for possible violation of a criminal statute; if so, give particulars. I am asking you a question.

Mr. UNGER. I am sorry. I did not understand the question. You are reading from question 19?

Senator METZENBAUM. Yes.

Mr. UNGER. I answered it no. I had no recollection of this being a criminal investigation. I also found out that through Judge Gilday, that there was another one in which I was peripherally involved when Mr. Rosenberg tried to block my nomination to the—to become General Counsel at Commerce.

Senator METZENBAUM. Well, is everybody——

Senator SPECTER [presiding]. Howard, if you are on question 8, that is the committee questionnaire.

Senator METZENBAUM. Pardon?

Mr. UNGER. No, he is on question 19, I believe, Mr. Chairman.

Senator METZENBAUM. Nineteen on the ABA questionnaire; question 8 of the committee questionnaire is—would you be good enough to read it, Mr. Short.

Mr. SHORT. Yes, sir. "Have you, to your knowledge, ever been under Federal, State, or local investigation for possible violation of either civil or criminal statutes? If so, give full details."

Senator METZENBAUM. Would you be good enough to indicate what was your answer to that question?

Mr. UNGER. I believe the same answer. I believe I was consistent. I did not think I was.

Senator METZENBAUM. May I see the answer to the committee question?

Now, under the committee questionnaire, you said yes. "See attached affidavit of Bernard Gilday."

That is the identical question, as I read it. I think it is. One says, "Have you, to your knowledge, every been under Federal, State, or local investigation for possible violation of criminal statutes; if so, give particulars." "No."

"Have you, to your knowledge, ever been under Federal, State, or local investigation for possible violation of either civil or criminal statutes; if so, give particulars." "Yes."

What is the answer, yes or no?

Mr. UNGER. Would the Senator give me the dates of the answers, please.

Senator METZENBAUM. Well, the date of the ABA questionnaire—I mean, of the ABA questionnaire, I guess we can get it for you.

Mr. UNGER. August 20.

Senator METZENBAUM. OK. And that quesionnaire of the committee, I am not sure of the date.

Mr. SHORT. He submitted it to the committee after the nomination, Senator.

Mr. UNGER. It would have been months after the ABA questionnaire and after I had found out from Judge Gilday that the investigation had in fact occurred.

Senator METZENBAUM. Well, Mr. Unger, I must tell you, one of my difficulties in this confirmation hearing has to do with the fact you are from Ohio, and I would naturally have a preinclination to support your candidacy.

Mr. UNGER. And I would sincerely appreciate that.

Senator METZENBAUM. But I have difficulty in so many of your answers which, not to quote Mr. Coleman, but to quote—actually to quote him, you are a moving target. Each time we get a certain point, you answer one way once and a different way the next time.

You indicate that when you say you are not related, that you thought that meant to have a conjugal relationship, not to be related from a business standpoint.

You execute an affidavit and do not disclose the facts to Mr. Aug, your partner, that you have a 2-percent interest in a financial transaction and overlooked that.

You overlooked including $40,000 of income in your income tax return. And you indiate that you resigned from the HUD when indeed you were fired, according to the evidence that we have.

Mr. UNGER. I have never said I resigned, Senator.

Senator METZENBAUM. Well, I think—let me go back and check. If I misquoted you, then I did not do that intentionally. But the facts are that everytime we come to a particular point with respect to—you are saying one thing one place and one thing in another. You want to know what date was it. The facts do not change in 2 weeks or 2 months.

Mr. UNGER. I believe I signed the ABA questionnaire in August 1982, and I was not nominated and probably did not sign this committee report for 4, 5, or 6 months. During that time I had been trying to work with the ABA, and it was during that time I contacted Judge Gilday. So my answer would be different. I would have new knowledge during that period.

Senator METZENBAUM. Was it knowledge as to whether you had been—whether you had—you certainly knew whether you had been under Federal, State, or local investigation for possible violation of a criminal statute. You knew that. It was either yes or no and it did not change in 5 months, did it?

Mr. UNGER. Yes, sir, it did.

Senator METZENBAUM. How?

Mr. UNGER. Judge Gilday—my impression of the investigation when my nomination is that they were investigating a client of mine, Hillcrest Square. Nobody told me they were investigating me, except I also knew at the same time my clearance was coming through for my appointment. It was not until I found out that Mr. Rosenberg had submitted the same things to the U.S. attorney—and I found that out through the ABA supplying those papers to the Justice Department, that I called Judge Gilday and said was I under investigation personally.

He said, yes you were, only you did not know it.

Senator METZENBAUM. Now——

Mr. UNGER. After he told me that, I knew it.

Senator METZENBAUM. You knew about the intelligence unit investigation by the IRS. That certainly came within those answers, did it not? It would have called for an affirmative answer.

Mr. UNGER. I did not consider that to be a criminal investigation. Apparently it is. I had no recollection of that.

Senator METZENBAUM. Let us go back to this transaction in which you had allegedly constructive income. Tell us exactly what that transaction was all about, would you please.

How did you get into it? What were your assets at the time? What did you do in connection with it?

Mr. UNGER. I am not sure I can tell you what my assets were at the time, but they were not substantial, if that will satisfy the Senator.

Senator METZENBAUM. OK, that is fine.

Mr. UNGER. I acquired rights to purchase an ongoing company called Modern Talking Pictures, I believe. It is a small company.

I then sold those rights to two other people, a third and a third, and one of the thirds, I believe, was divided into sixths using two venture capital companies.

We formed a corporation which became the holding company, the name of which I believe was Modern Media. Modern Media then borrowed some money from a bank, and the two other——

Senator METZENBAUM. Give us the numbers, would you please?

Mr. UNGER. Sir?

Senator METZENBAUM. Give us the numbers.

Mr. UNGER. I cannot. I cannot. We are talking about—that borrowed a million or more dollars from a bank. And each of the other two partners, I believe, owned $400,000 or that is the sum of it.

Senator METZENBAUM. But your total purchase price was $2.5 million, a little more?

Mr. UNGER. That would not be a figure I would dispute with you.

Senator METZENBAUM. Pardon?

Mr. UNGER. That would not be a figure I would dispute with you.

Senator METZENBAUM. OK. Go ahead. Go ahead.

Mr. UNGER. Subsequently, there was a determination to take the company public. We were advised by the company that was going to do the underwriting—this was probably in 1969. We were advised by the people that were going to do the underwriting that it would look inappropriate for investors to have loans and it was suggested that the two investors that had loans to the company make capital contributions of their loans.

I did not have a loan to the company. The other two investors did. In order to satisfy the underwriters for what promised to be a profitable underwriting, though it did not take place, sir, they made a capital contribution of their loans.

Senator METZENBAUM. Of $400,000 or was it $800,000?

Mr. UNGER. I am not sure.

Senator METZENBAUM. $400,000, I think.

Mr. UNGER. Thank you, thank you.

Senator METZENBAUM. And that is when they made that contribution and you owned a third of the company, that is how IRS concluded that therefore you had constructive income of the $130,000?

Mr. UNGER. That is where the lady auditor got her theory, yes, sir. And if you will read the protest, you will see that it was lacking in much basis. But that is correct.

Senator METZENBAUM. Then what happened?

Mr. UNGER. The underwriting did not take place. The economy was bad. The underwriting did not take place. Ultimately the merged company merged into another company that went into chapter 11.

Senator METZENBAUM. All right. Now, Mr. Unger, you said and have made the point very strenuously that you filed your tax return before you were ever checked, that you did it without any knowledge that you were being checked.

Mr. UNGER. No, sir; I made the point that I revealed to the IRS before I knew that there was any audit. I got a letter from the woman proposing to audit me before the—you are talking about my amended return, are you not, sir?

Senator METZENBAUM. Pardon?

Mr. UNGER. You are talking about my amended return?

Senator METZENBAUM. Amended return.

Mr. UNGER. The point I was making is that I revealed that I had found this income to the general counsel of the Department of Treasury before I was notified that there was an audit. I was notified that there was going to be an audit before the amended return was filed, and I had advice from counsel to the effect that if I did not want to do that, there was a claim that I could make that it was not taxable.

Senator **Metzenbaum**. Now, you admit—I am sure you would admit that it is very critical to our inquiry as to whether you acted on your own to report the additional $40,000 or whether you did so only after the IRS started to check your return. Would you agree?

Mr. **Unger**. That is why I gave you Mr. Eggers affidavit.

Senator **Metzenbaum**. Pardon?

Mr. **Unger**. That is why I presented Mr. Eggers affidavit.

Senator **Metzenbaum**. Then, how would you respond to this language in the IRS report, page 5——

Mr. **Unger**. May I have a copy?

Senator **Metzenbaum**. I think you have a copy because it is the January 13, 1972, Internal Revenue Service report.

Mr. **Unger**. I have never seen it.

Senator **Metzenbaum**. You have never seen it.

"No part of the $40,000"—excuse me. I will read it to you.

Mr. **Unger**. Go ahead. That is all right.

Senator **Metzenbaum** [reading]:

> No part of the $40,000 was reported as income on the original return filed by the taxpayer. But after the examination of the return was started, an amended return was filed in which he reports the sale of two-thirds of his rights for $40,000, less reimbursement costs for balance of a short term capital gain of $36,556.85.

Now, that is exactly contrary to your representation to this committee.

Mr. **Unger**. I do not believe it is, Senator. I believe I said I advised the General Counsel of the Department of Treasury in January 1970.

Senator **Metzenbaum**. Well, now, let us talk about that advising now. Now, what he really says is that:

> My name is Paul Eggers. I was appointed by the President as general counsel of Treasury on April 1, 1969, and I resigned on March 20, 1970, to be the Republican candidate for Governor of the State of Texas.
>
> While I was in Washington, I became acquainted with Sherman Unger as general counsel of HUD. In December 1969 Mr. Unger called me at my office at Treasury, inquiring about the tax aspects of the new capital gains provisions of the 1969 Tax Reform Act.
>
> He stated he was negotiating on a sale of capital stocks. I referred him to another office for this information. In January 1970, we attended a reception at the Federal Bar Building for Justice Tom Clark. Mr. Unger did not have a car, and I offered to take him home.
>
> We stopped on the way home at a club. In the course of visiting, I asked Mr. Unger if he obtained the information he needed on the tax law. In the course of our conversation he told me that he discovered that he had failed to include some income from the sale in his tax return, which he had filed at the last moment on April 15, 1969.
>
> He did not state the amount or type of transaction. I advised him to file an amended return and include a letter of explanation stating the facts as to the reason for the oversight.
>
> Shortly after talking to Mr. Unger about his omission of income, I advised Mr. Marlin Worthy, chief counsel of the Internal Revenue Service of the fact that Mr. Unger had told me about his omission and I advised him to file an amended return.
>
> Mr. Worthy, as I remember, agreed that my decision was correct.

Now, as a matter of fact, you had not gone to Mr. Eggers as an official of the Government. You met him at a social affair. You went out and had a drink with him. He gave you a ride home. And while you were riding in the car with him, you said, oh, incidentally, I filed a tax return that did not disclose all of my income. What do you think I should do with it?

Is that about what happened?

Mr. UNGER. We were not in the car. And Mr. Eggers did report it to the chief counsel for the IRS.

It was not simply passing conversation on the way home. I was very serious about it and I was concerned.

Senator METZENBAUM. This happened at the club?

Mr. UNGER. I cannot remember even what club, but if he says we were at a club, we were at a club.

Senator METZENBAUM. That is what Mr. Eggers says.

Mr. UNGER. Yes; we were——

Senator METZENBAUM. You were not going to Mr. Eggers in his office and making an official representation. You were talking with a man whom you know. You were very active in the Republican Party. He was the Democratic candidate for Governor at the time. You said—I guess he could not——

Senator SPECTER. He was a Republican.

Senator METZENBAUM. Pardon?

Senator SPECTER. Republican.

Senator METZENBAUM. Republican candidate for Governor.

Mr. UNGER. He was a candidate when he signed the affidavit, not when he was General Counsel at the Department of Treasury. He had a serious duty. Any revelation, I think he would take serious when it deals with tax matters.

Senator METZENBAUM. But you do recognize that you did not go in as any normal taxpayer would have done or send a letter in until after he told you about it, that you had failed to include some of your income.

And now you want us to accept the fact that this was a voluntary disclosure on your part to the IRS before the investigation took place.

Mr. UNGER. Clearly, Mr. Eggers made the revelation to the IRS Chief Counsel very shortly thereafter, as I would have expected him to have done.

Senator METZENBAUM. Now, Mr. Unger, all he said is that: "Mr. Unger told me about his omission. I advised him to file an amended return and that Mr. Worthy agreed that my advice to him was correct."

Mr. UNGER. Is the issue here——

Senator METZENBAUM. You did not tell him the amount.

Mr. UNGER. No, sir, I didn't. Is the issue here whether or not I filed my amended return before the audit or after the audit?

Senator METZENBAUM. No; I think that the issue is the integrity and forthcomingness of you as a candidate for the judiciary. I think those who are candidates for the judiciary are not expected to omit income from their tax returns, to file false affidavits, to have other instances of questionable character with respect to their proper actions as a member of the bar, ex parte conversations.

I think it is a total picture. And I make no bones about it, that it is not one thing that brothers me about you; it is everything.

And I am frank to say to you, Mr. Unger, I have not voted against many jurists; if I have voted against any, it might be a maximum of one. I am not sure if I even voted against one. But I have checked with the members of the bar in Cincinnati, and of course not all of them—I am sure many of them would support your candidacy. But all of those with whom I have checked have not given you favorable marks as far as being a jurist.

And that is what is worrying me, that when I sit here—I have no desire to sit here and oppose your nomination. But the facts—you made the facts. I did not create the facts. You made the facts. You have changed your story in so many instances that I say to myself, how can this man hope to sit as a member of the Federal judiciary, the circuit court of appeals, no less, and that is what is concerning me. I assume that is what is concerning a number of Members of the Senate.

Mr. SHORT. Senator, if I may interject——

Mr. UNGER. I disagree on a number of points, but I understand your position. I still did tell Mr. Eggers in January 1970. He still did tell Mr. Worthy in January 1970.

Senator METZENBAUM. Mr. Unger, I want to come back to this designation on your life as being sensitive. Was it sensitive because you were being considered for political appointment?

Mr. UNGER. Sir, I did not know until Thursday that it was sensitive, and I got that information from you. So there would be no way I could answer that.

Mr. SHORT. Senator, if I may interject, we have asked the Internal Revenue Service to supply us with the information as to defining the word "sensitive."

Senator METZENBAUM. Well, I have tried to go back to some of the former Commissioners and see what they can tell me about that, and some of them say that sensitive might be the designation in connection with a political appointment, but it also might be the designation with respect to a particularly prominent individual such as someone in the theater world or something of the kind.

Now, the year in which you overlooked the $40,000, how much was your other income?

Mr. UNGER. I think the return will indicate a gross income of about $68,000.

Senator METZENBAUM. How much?

Mr. UNGER. $68,000, I believe, gross income. I think that is correct.

Senator METZENBAUM. Taxable income of $49,000 sound right to you?

Mr. UNGER. That sounds right.

Senator METZENBAUM. So that what you are really saying is that you used income averaging, and with income averaging it came out to $37,000. Well, that your income, based upon my calculations, as pertains to the income averaging, I would gather that your income for the 4 previous years was approximately $30,000 to $40,000 a year?

Mr. UNGER. It probably started lower and worked its way up to the figure that I have. Someplace in there I became a partner in my law firm. I am not too sure if I was a partner all year as used in the averaging or not.

Senator METZENBAUM. Now, what did you do with the checks when you got them?

You got two checks, you said, for $20,000 each.

Mr. Unger. As I read the papers that have been sent me by my lawyers, I deposited it in my checking account and immediately wrote a check for $30,000 to pay for the stock, leaving some $9,000 in the checking account.

Senator Metzenbaum. Now, when you prepared your tax return, did you go through your checkbook?

Mr. Unger. Yes, sir.

Senator Metzenbaum. And you did not find it in your checkbook when you were preparing the return?

Mr. Unger. I did not find it. I overlooked it. I obviously was not conscious of it.

Senator Metzenbaum. Mr. Unger, assume that you are now on the bench. It may be the district court or the circuit court. And a taxpayer comes before you and says that I had $49,000 of taxable income and $40,000 that I just simply overlooked and forgot to pay it.

What would be your reaction as a jurists?

Mr. Unger. My first question would be, were there any penalties assessed.

Senator Metzenbaum. And if there was one, as there was in this case——

Mr. Unger. If there was one, what kind of penalty was assessed. There are a broad range of penalties from criminal fraud, civil fraud, to negligence. In my instance, the IRS determined that I was negligent.

Senator Metzenbaum. Do you think you might have had favorable treatment because you were a presidential appointee.

Mr. Unger. I think I might have had the other side of the problem, that they were more careful.

Senator Metzenbaum. Did you talk to anybody at all about this matter in the administration?

Mr. Unger. Did I talk to anybody? Oh, yes, sir.

Senator Metzenbaum. Who?

Mr. Unger. As I said, I was notified by somebody in the White House on, I believe, the 28th of July that the intelligence division was in it, but I cannot tell you who it was.

Senator Metzenbaum. And after this development, your nomination to the FCC was held up.

Mr. Unger. Yes, sir.

Senator Metzenbaum. And it was held up by members of your own party?

Mr. Unger. I believe that would be correct. I believe the White House would have wanted the intelligence division to conclude their investigation. And that certainly seems reasonable.

Senator Metzenbaum. And is it not a fact that Senator Norris Cotton, the ranking Republican member of the Commerce Committee placed a hold on the nomination?

Mr. Unger. That is what I understand.

Senator Metzenbaum. Well, is it not a fact?

Mr. Unger. Sir, I do not know what goes on in the Senate. I understand he did. I do not know who puts holds in the Senate.

I was advised that he was, but I do not know that as a fact.

Senator Metzenbaum. Mr. Chairman——

Mr. Unger. I have no reason to disagree with that.

Senator METZENBAUM. I have many more questions, but not on the tax issues. I want to get into the HUD matter, but if you have questions on the tax matters, perhaps it might be fair to bounce back and forth.

Senator SPECTER. Well, thank you, Senator Metzenbaum. I have some questions on the tax matter, but it is not at the top of my agenda. Why don't we alternate. You have had about half an hour. I will take about half an hour.

Senator METZENBAUM. Very good.

Senator SPECTER. Mr. Unger, the most important issue, in my judgment, although there are many issues of importance, would be the one on the ex parte issue, and that has not been the subject of as much inquiry as has the tax matter. So I am going to turn to that at this time.

And I would refer you to a document that I believe you are familiar with, and that is the transcript and the argument, Court of Appeals before the Third Circuit——

Mr. UNGER. Yes, sir.

Senator SPECTER [continuing]. And specifically to page 11 of tab 13. If you take a minute to get that, I will wait for you.

Mr. UNGER. Page 11. What was the other one, the number, sir?

Senator SPECTER. It is tab 13, page 11.

And this is the argument before the third circuit on the case captioned "In re: FREIDCO, Wilmington, Delaware, Limited, a limited partnership debtor, Unit, Inc., FREIDCO of Wilmington, Limited, appellants."

Mr. UNGER. We were the appellant. It was my appeal, sir.

Senator SPECTER. And the court here says:

> I gather from these briefs the way you proceed in Ohio is that a lawyer can go and talk to a judge at any time without getting counsel for the other side there.
>
> Mr. UNGER. I would not go that far your honor.
>
> The COURT. Isn't that what it shows, you and this Judge Gartner were talking to each other all the time? Isn't that what he testified to when he was on the stand?
>
> Mr. UNGER. He testified that we talked. It is the word all the time that gives me some problem. Judge Gartner as a bankruptcy——
>
> The COURT [interjecting]. He repeated more than once.
>
> Mr. UNGER. Yes, Your Honor.
>
> The COURT. We don't do that here. Is that consistent with the canons of ethics, that you go and talk to the judge when the other counsel representing other parties are not there.

Do you consider the court correct in saying that your conduct violated the canons of ethics?

Mr. UNGER. May I read my answer to the question?

Senator SPECTER. You may. And then come back and answer my question.

Mr. UNGER [reading]:

> It is, Your Honor, in a bankruptcy court where the bankruptcy judge rules and holds. He wears two hats. One is administrative where he asks about the administration of the estate, particularly an estate that is being reorganized. I would agree on a matter that is being litigated in controversy.

Prior to 1978, I believe it was not a violation of the canon of ethics if a bankruptcy judge called you in on an administrative conference.

Senator Specter. Now, wait a minute. Where is the language indicating that it was an administrative conference?

Mr. Unger. It is in my answer, sir.

Senator Specter. I do not see the language of administrative conference. Where does that language——

Mr. Unger. I was speaking of a judge calling you in, where a judge says he wears two hats. What I was trying to say is, an administrative conference would be proper.

Senator Specter. Well, now wait a minute. You are saying you stopped reading your answer and started testifying beyond that?

Mr. Unger. Yes, sir, I would be glad to. I think that——

Senator Specter. My question to you is: Did you stop reading the answer here and start to testify?

Mr. Unger. Will I or did I, sir?

Senator Specter. Did you?

Mr. Unger. Yes, yes, I think I did.

Senator Specter. Well, my question to you, Mr. Unger, is: Do you think that the third circuit was incorrect in categorizing your conduct as violative of the canons of ethics?

Mr. Unger. Not if it was an administrative conference, as I understood it to be.

Senator Specter. Well, did not some of the matters at issue involve substantive questions?

Mr. Unger. Some of them were or got very close to that in my judgment. I agree with that.

Senator Specter. Well, then if you have a substantive matter, would it not be a violation of the canons of ethics?

Mr. Unger. I did not believe when the bankruptcy judge is setting the line—and I think you heard Mr. Aug testify the other day that the bankruptcy judge himself would decide when he had gone too far and would call other counsel if he thought he was reaching a point were other counsel should be.

I guess I did not believe it was my position to say, judge, you are going too far.

Senator Specter. Well, there are two points at issue here, and the point I am questioning you on at the moment is whether it is a violation of the canons of ethics to discuss a substantive matter with a judge?

Mr. Unger. It clearly is.

Senator Specter. All right.

Mr. Unger. Substantive matter in litigation. It might be a substantive matter in administration and not have been at that date.

Senator Specter. Well, you discussed with the judge substantive matters in litigation so you did discuss substantive matters of litigation. There are two points here. One is that if it is an administrative matter, then you are contending that you can have an ex parte discussion.

Mr. Unger. You could have——

Senator Specter. Excuse me. Excuse me. And a second line of defense that you are raising is that even if it was improper, the judge caused it.

Now, I want to take up the first matter. I want to take them up separately so I understand your position. Now, as I understand your testimony so far today, you did discuss with the bankruptcy judge substantive matters which were in controversy, which you now say was a violation of the canons of ethics.

Mr. **Unger**. Are you through, sir?

Senator **Specter**. I am through.

Mr. **Unger**. The initial discussions went to a ruling that was outside of the record that really had nothing to do with the case I had before the judge, which was given the judge ex parte by one of my opponents. We discussed what happened in Wilimington, Del., and that really, I believe, was an administrative conference explaining what happened to the debtor in possession in another case.

Senator **Specter**. Mr. Unger, let me interrupt here. We have a very limited amount of time and a great deal of ground to cover. And I would prefer not to go over all the conferences you had unless you want to by way of answer.

Mr. **Unger**. This is the conference we are talking about.

Senator **Specter**. Well, was there any point in the course of the conference where you discussed a matter of substantive law which was in controversy?

Mr. **Unger**. Substantive law. We discussed filing a strong application for reconsideration. He instructed me to file a strong application. We did not discuss the context of the application.

Senator **Specter**. Well, then you prepared the application. You came back and you had an order attached to it.

Mr. **Unger**. No, sir. There was no order attached to it. I came back with a memorandum attached to it.

Senator **Specter**. A memorandum.

Mr. **Unger**. Which the rules require in the Southern District of Ohio.

Senator **Specter**. And it was a rather lengthy memorandum, seven or eight pages?

Mr. **Unger**. Yes, sir.

Senator **Specter**. Well, now my question to you is: In the course of that incident, was there or was there not a substantive matter which was controverted, that is, in controversy between you and the other party?

Mr. **Unger**. It was not in controversy until he decided to do something with it, but it would have been, yes, sir.

Senator **Specter**. Your answer is yes?

Mr. **Unger**. It would—if he filed it—I did not realize he was going to issue an order on it. There was—it could have been set down for hearing, right? My application could have and properly should have——

Senator **Specter**. He could have terminated the one-sided discussion and sent for the other lawyer. But I am trying to find out whether he made a ruling based on the documents which you filed, and whether this was a substantive matter as opposed to an administrative matter.

Mr. **Unger**. Once he issued his ruling, it became controversial, yes, absolutely.

Senator **Specter**. So that the matter involved with the judge was not just an administrative matter which prior to 1978 could have been handled on an ex parte basis without being a violation of the canons of ethics.

Mr. **Unger**. That is correct.

Senator SPECTER. All right. Now, the second line of defense, which I understand you are interposing here is that it was the judge who requested the meeting.

Mr. UNGER. Yes, sir.

Mr. SPECTER. My question to you on that is, Mr. Unger, does that make it justifiable to do something which is unethical if the judge initiates the meeting?

Mr. UNGER. No, sir, it does not.

Senator SPECTER. So you are not saying that that is a defense to——

Mr. UNGER. I am saying the judge initiated an administrative conference. What we are talking about is where that line was crossed, if it was crossed. I had no intention of crossing an ethical line, and I would point out that no time—from that meeting in 1977 has anybody seen fit to take any action against me or with the Bar Association.

It was certainly closer to the line than I was comfortable being.

Senator SPECTER. The third circuit goes on in this exchange, Mr. Unger:

"The COURT. Well, this certainly was in litigation and a lot of controversy."

That was the court's conclusion at that time. Correct? I am reading at the bottom of page 12 just after your answer ended.

Mr. UNGER. Yes, sir.

Senator SPECTER.

> It was in the Texas court and it was in the Delaware court, and so on. And that sounds to me as being completely inconsistent with the canons of ethics. I assure you that that is not the way things are done in this circuit.

And you respond:

> I can only speak for Judge Gartner and the way he looks upon his duties as a bankruptcy judge. I would submit that I would not refuse to see him if he asked me for an administrative report.
>
> You are a member of the bar?
>
> Mr. UNGER. Yes, sir.
>
> "THE COURT. Don't you, when you want to go to see a judge, tell the other lawyer involved in the case that you're going to see him and would they please come with you?
>
> Mr. UNGER. In any other matter except a bankruptcy matter when the judge asks for an administrative conference.

Senator METZENBAUM. Would the Senator——

Mr. UNGER. Would you read the next comment from the court, please, sir?

Senator METZENBAUM. Would the Senator just permit me for one moment? I know he did not interrupt me, but I would like to point out that Mr. Unger has been consistently saying that the judge asked for the conference. And yet I now find that there is a brief filed in the U.S. Court of Appeals for the Third Circuit, exhibit 17, in which Mr. Unger—it is Mr. Unger's brief.

And he says there, "Counsel for Unit requested an administrative conference with Judge Gartner to ascertain the effect of FREIDCO's trustee on the progress of the Unit proceeding."

And you have been telling us the judge initiated it. But in your own brief you said you initiated it.

Mr. UNGER. May I refer the Senator to the citation in the brief. There was a misstatement in the brief you will see that it was me saying——

Senator METZENBAUM. Excuse me for interrupting.

Mr. UNGER. It is me saying that—Senator, the citation in the brief reads, "And someplace along there Judge Gartner called me in on an administrative conference and said, what's going on, what's happening in Wilmington?" That's the citation that the statement refers to.

That is the July 21, 1977 argument before Judge, Stapleton.

Senator METZENBAUM. What are you reading from?

Mr. UNGER. Sir?

Senator METZENBAUM. What are you reading from?

Mr. UNGER. July 21, 1977, before District Judge Stapleton at page 18. That is the citation in the brief.

Senator METZENBAUM. Is that an exhibit here?

Do we have it?

Mr. UNGER. I am not sure, sir. Let me look.

Senator METZENBAUM. Well, again, I guess we——

Mr. UNGER. If not, I can certainly tender it. I testified about it several times.

Senator METZENBAUM. You are saying that your brief was inaccurate?

Mr. UNGER. That is correct. But the citation is accurate.

Senator SPECTER. What were you reading—may we see what you were reading from, please.

Mr. UNGER. Yes. Let me hand up what I have.

Senator SPECTER. Please.

Mr. Unger, you have handed me a letter dated July 19, 1983. Do you have a copy of the transcript?

Mr. UNGER. Yes, sir, it is attached. It should be attached to the letter.

It should be the top paragraph of the July 21 hearing, page 18. I have the whole transcript.

Senator SPECTER. So your position is that the brief which refers to counsel, which would be you, requesting the conference, is inaccurate?

Mr. UNGER. It refers to the transcript. It does not reflect the transcript accurately; that is correct, sir.

Senator SPECTER. A mistake in the brief.

Mr. UNGER. May I have one of the sets of papers back?

Senator SPECTER. Mr. Unger, to try to move on, let me wrap up this with a question to you as to whether you think the third circuit unfairly categorized your conduct as they concluded?

Mr. UNGER. Not the way I understand the third circuit. I do not—it is my understanding that bankruptcy judges in the third circuit did not do what bankruptcy judges in the southern district of Ohio did. Certainly, it clearly would have been inappropriate in the third circuit. And I understand those things did not happen.

Senator SPECTER. Mr. Unger, there are two other allegations of ex parte communications. And they appear at page 31 of the ABA submission: An allegation that on April 19, 1977:

> Mr. Unger obtained an ex parte order from Judge Gartner in the Scioto Park bankruptcy proceeding. That order shortened the time for production of documents

> from 30 days to 10 days by the Pittsburgh National Bank, a creditor of Scioto Park and an opposing party in the Scioto Bank proceeding.

Have you commented on this allegation so far in these proceedings?

Mr. UNGER. I do not think I have, but I would be pleased to do that. I believe the rules provide just exactly for that. Let me see if I can read the rule to the chairman.

It is rule 909 of the bankruptcy procedures—906. I am sorry. I am misreading it. 906(c), reduction, talking about time.

> Under these rules or by a notice given thereunder or by court order and act as required or allowed to be done within a specific time, the court for cause shown may at its discretion with or without application or notice order the period shortened, but it may not reduce the time for taking any action under rule 203, * * *

Et cetera.

In other words, the bankruptcy rules specifically provided for that shortening ex parte.

Senator SPECTER. The allegation goes on to say:

> In a hearing on April 20, 1977, Mr. Unger's opposing counsel complained to Judge Gartner about the impropriety and unfairness of Mr. Unger's procurement of such an order without any notice to them and moved for reconsideration of the order.

What happened on that application, Mr. Unger, if it in fact was made?

Mr. UNGER. May I consult with my associate to be sure I am talking about the right thing?

Ultimately there was a dialog between the judge and counsel. Out of that discovery, I believe, the sanctions I read earlier were ruled against my opponents. We will try to find it exactly in the transcript for you, Senator.

Senator SPECTER. While you are looking for it, going on to another allegation, the ABA committee says that, "We recently received evidence that Mr. Unger obtained an ex parte order requiring a deposition to be taken in Los Angeles, Calif. on June 2, 1966."

Have you responded to that allegation in this proceeding?

Mr. UNGER. No, no, I have not.

Senator SPECTER. Would you please do so now.

Mr. UNGER. I have no recollection of it, and again that is the proceeding in which Mr. Keeler was found contemptuous continually. I have no recollection of the incident. And I believe that comes from a momorandum dictated to the file by Mr. Keeler, purportedly in 1966.

Senator SPECTER. Was there any hearing or proceeding on Mr. Keeler's complaint at that time or any other time?

Mr. UNGER. I have been advised by one staffer that he has seen a transcript of that. I understood it was part of the ABA filing, and I went through everything the ABA gave me last night and did not find it.

I have no independent recollection of that particular incident.

I do know who was sanctioned in the trial——

Senator SPECTER. Do you have or know where we can get the original, or at least a copy of the original, of the Eggers affidavit? What you have presented here is a paper marked "Affidavit" which Senator Metzenbaum has read into the record, which is not even a copy of the affidavit. It purports to be a conformed copy with "s/s Paul W. Eggers" and the same thing in typing of the name of the notary public. It does not look very authentic on its face.

Mr. **Unger**. It is all I was able to get since Thursday. I would assume that the original is with the Internal Revenue Service, but I would think that Mr. Eggers could be contacted and asked if he recognizes that as his affidavit and would give an affidavit saying that this is what he recognizes he has previously sworn to.

Senator **Specter**. Mr. Eggers lives in Texas at the present time.

Mr. **Unger**. Yes, sir. He is in the hospital today, but I am sure he is reachable—maybe he is not.

Senator **Specter**. And your testimony is that this document, which you have testified about, you have seen in its original form as an affidavit?

Mr. **Unger**. Yes, sir.

Senator **Specter**. Mr. Unger, Mr. Short made available to me just a few moment ago a document which he advises was filed by you on the IRS matter, relating to the 1970 transaction. I would like you to take a look at it and tell me if this, in fact, was filed by you.

Mr. **Unger** [perusing document]. Yes, sir, I have seen it, and when I did that, to the best of my memory, I thought that was what happened, until I got back——

Senator **Specter**. You filed that sometime after May 1983. There is a letter dated May 3, 1983, which is an American Bar Association letter, which raises a number of allegations.

Mr. **Unger**. Yes, sir.

Senator **Specter**. My question is, If you can explain, how does it happen that you knew sometime in 1983, after May 3, that there was $40,000 in income as described in that document, and you testified last week to a totally different circumstance, being a $40,000 legal fee? You have testified here earlier today that when you testified last week, you did not remember that transaction.

Mr. **Unger**. That is right.

Senator **Specter**. But just a couple of months ago, you knew what the transaction was. But last week, you are now saying you were totally in error in testifying that the $40,000 was a legal fee.

Mr. **Unger**. That is correct.

Senator **Specter**. How can you explain that?

Mr. **Unger**. I got mixed up, I guess. I don't know whether it was—it clearly was not a fee. It was a sale of rights.

Senator **Specter**. But you knew that it was not a fee by spring/summer of 1983; it is a 1970 transaction——

Mr. **Unger**. Yes.

Senator **Spector** [continuing]. But as recently as a couple of months ago, you knew it was not a fee.

Mr. **Unger**. That is correct. I made a mistake when I said it was a fee.

Senator **Specter**. Mr. Unger, there are quite a few additional questions which I have, and I know Senator Metzenbaum does too, and I have just conferred with Senator Metzenbaum as a matter of our procedure here, and it is our judgment that we really ought to proceed at this time to some of the other witnesses who have come quite a distance.

I do not want to be unfair to you. I think you have had an opportunity to respond, which Senator Hatch wanted to see that you did, and I guess the best way to approach it is to see if you have any objection or concern about our interrupting your testimony at this time to proceed to other witnesses.

Mr. UNGER. No, I have no objection at all.

Senator SPECTER. Fine.

At this time, we will call upon Justice Moore to step forward, and we will wait for Mr. Van Dusen, because Senator Hatch said specifically that he would like to hear Mr. Van Dusen's testimony.

Justice Moore, would you stand and raise your right hand, please?

Do you solemnly swear that the testimony you are about to give before this committee is the truth, the whole truth, and nothing but the truth, so help you, God?

Justice Moore. I do.

TESTIMONY OF JUSTICE ANDREW G. T. MOORE II

Senator SPECTER. Would you state your full name and position for the record, please?

Justice MOORE. Yes, sir. My name is Andrew G. T. Moore II, and I am a justice of the Supreme Court of the State of Delaware.

Senator SPECTER. How long have you held that position?

Justice MOORE. I was appointed by Governor DuPont in May 1982.

Senator SPECTER. Are you a member of the bar of the State of Delaware?

Justice MOORE. Yes, sir, I am.

Senator SPECTER. And in connection with your duties in the practice of law, did you have occasion to get to know Mr. Sherman Unger?

Justice MOORE. Yes, sir, I did.

Senator SPECTER. Proceed in your own way to tell us what you consider to be relevant in this matter, Justice Moore.

Justice MOORE. Yes; I did prepare just a brief set of introductory remarks that might set the stage for my relationship——

Senator SPECTER. Please proceed as you choose.

Senator METZENBAUM. Do you want to bring the mike a little closer, too?

Thank you, Justice.

Justice MOORE. My appearance today is pursuant to the committee's subpena to testify regarding the nonimation of Sherman E. Unger as U.S. circuit judge for the U.S. Court of Appeals for the Federal Circuit.

From 1964 to 1976, I was an associate and later a partner of the Wilmington, Del., law firm of Killoran & Van Brunt. In September of 1976, I became a member of the Wilmington law firm of Connolly, Bove & Lodge, and engaged in the active practice of law, until my appointment to the Delaware Supreme Court in May 1982.

In April of 1976, I became associated as counsel with Sherman E. Unger in a matter pending in the U.S. District Court for the District of Delaware, involving the reorganization under chapter 12 of the bankruptcy laws of a limited partnership known as FREIDCO of Wilmington, Del. The general partner of FREIDCO was a corporation known as Unit, Inc., which was then in a chapter 11 bankruptcy reorganization pending in the Southern District of Ohio, before the Honorable Leonard C. Gartner. However, my role was limited solely to acting as cocounsel with Mr. Unger on behalf of FREIDCO and Unit in the Wilmington bankruptcy proceedings.

In responding to the committee's subpena, I understand that the committee wants to query me about my knowledge of Mr. Unger's role in obtaining an ex parte order from Judge Gartner, asserting jurisdiction over the FREIDCO matter, after the Delaware bankruptcy court had ordered a trustee appointed to FREIDCO in June 1977. In addition, I understand that the committee requests details of my withdrawal in January 1980 from the FREIDCO matter because of Mr. Unger's filing of a false affidavit with the U.S. District Court of the District of Delaware.

Until this week, I have not been queried by anyone regarding Mr. Unger's nomination. Neither the ABA Standing Committee on the Judiciary nor any other investigative agency, including the FBI, have interviewed me. Thus, whatever may be in the record to date has not been furnished by me or, to my knowledge, by any of my former law partners.

Turning to the matter of the Judge Gartner order, I believe the Committee is aware that the trustee was appointed in June 1977, approximately a year after that issue had been tried before Judge Balick in the bankruptcy court. And I received word of the appointment of the trustee while I was on vacation—and I was out-of-town that year from June 28 to July 11. At some point while I was on vaction, I do not recall whether I spoke to Mr. Unger or through one of my partners, received word that of course, the first thing we wanted to do was to apply for a motion for reargument before Judge Balick. We thought that the decision was rather shallow in its content and that we had an excellent record on the mertis to overturn it, if not before Judge Balick, certainly, on appeal to the U.S. district court or ultimately, to the third circuit.

Upon returning home for a week in July—and I think I got home on about July 11—I eventually got a telephone call from Mr. Unger. It is my recollection it was on or about July the 14th. And he told me that he had gone to Judge Gartner, that he had requested and obtained an order basically reasserting jurisdiction over the FREIDCO matter, and that I would receive the order by express mail or by some form of express delivery and was to distribute copies to all counsel and the court, and the trustee.

Senator **Specter**. Judge Moore, when you testify that Mr. Unger said he had gone to Judge Gartner, are you sure that he said that he, Mr. Unger, had gone to Judge Gartner?

Justice **Moore**. Senator Specter, my best recollection is precisely as it turned up in the third circuit brief, that Senator Metzenbaum referred to, that Mr. Unger had gone to Judge Gartner.

Senator **Specter**. Was there a specific discussion between you and Mr. Unger on who initiated the contact, that is, whether it was Mr. Unger or Judge Gartner?

Justice **Moore**. Well, there was, because I must say I was a little surprised by the news that I had gotten. The order, in effect, was staying the action of the trustee, and it was quite unusual from my standpoint for anyone to obtain an ex parte order of that type and that scope without counsel or anyone else being advised.

Senator SPECTER. Did you discuss the nature of the ex parte order specifically with Mr. Unger?

Justice MOORE. I did not before he got it. Mr. Unger was telling me what he had obtained.

Senator SPECTER. I understand you were not a party to getting the ex parte order, but my question is whether you had a specific discussion with Mr. Unger on the fact that an ex parte order was obtained, whether you had a discussion with him as to who initiated the contact.

Justice MOORE. Yes, sir, I did have a discussion that it was obtained on an ex parte basis, and Mr. Unger related to me over the telephone essentially what it provided.

Senator SPECTER. But did you have a specific discussion with Mr. Unger as to whether Mr. Unger had contacted the judge, as opposed to having the judge contact Mr. Unger as the initiator?

Justice MOORE. It is my best recollection, Senator, that Mr. Unger told me that he had raised that point with Judge Gartner initially, because the problems, as Mr. Unger, I think, was foreseeing them was that he was going to get nowhere in the Delaware bankruptcy court and felt that the best recourse was to obtain some form of relief in Ohio.

Senator SPECTER. Did you raise any point with Mr. Unger that suggested that it was improper to have obtained an ex parte order?

Justice MOORE. Well, I raised several points in that regard, Senator. First of all, I asked Mr. Unger about the propriety of obtaining such an ex parte order, and he assured me that that was entirely proper under their local practice.

Second, and equally as important in my view, was the question of the basic legal principles upon which he was relying to get the order. As I understood it, and we get into some esoteric concepts of bankruptcy, but Mr. Unger felt that the order that he had obtained was absolutely sound as a matter of law, that it could never fall, and that we were in a superior position because in some way or other, the argument was that the Ohio bankruptcy court had actually, at one point, asserted jurisdiction, and the first to assert jurisdiction can always reclaim it, if I am not mistaken—and frankly, I am vague on the principle of law, here—but I was very concerned about the effect of the ex parte order, and second, I was very concerned about the fact that it did not seen to me that it was going to stand up under challenge. And Mr. Unger was very definite, because I asked him. I said, "Are you absolutely certain of the legal principles upon which you are relying?" And he said—he did not use the word, "infallible," but that was the impression that he felt——

Senator SPECTER. And you say you had a conversation with him about the ethics of the matter?

Justice MOORE. Absolutely, because I was concerned when it arrived on my doorstep, and I suddenly found my self delivering this, because I was being told in the course of this conversation that I was to deliver the ex parte order. And in fact, I was quite concerned that when I delivered it, I immediately was going to be queried about how this had occurred and the propriety of it. And in fact, that did indeed occur. I was immediately besieged by inquiries, and I was called by opposing counsel, and it became quite obvious that we were in for a major battle, not only because of the ex parte nature of the order, but because of its basic legal underpinnings.

As I said, it surprised me because I thought we had a good case on the merits to overturn Judge Balick's order. I was a little surprised about Mr. Unger's statement when he said he was worried that Judge Gartner might appoint a trustee for Unit, because one of the questions that I asked Mr. Unger essentially, throughout this conversation, was, "If you are not right, and if we lose, what are the ramifications going to be across the board?" I thought that they would be disastrous in Delaware, and in essence, Mr. Unger said he did not feel that there would be any effect in Ohio, because—and I think this is absolutely accurate—he believed—and I think it is the case—that Judge Gartner by that time had great and total confidence in what Mr. Unger was doing. I think he respected Mr. Unger's abilities and respected Mr. Unger's views and that there was little likelihood that he was going to do anything contary to Mr. Unger's position.

The result of all this, of course, was extensive litigation. It sidetracked any serious attention to the merits of the FREIDCO bankruptcy for approximately a year and, very regretfully—and I think Mr. Unger would agree with me when I say this—that it destroyed virtually any semblance of his credibility in the eyes of the Federal judges of Delaware.

And that was essentially my connection with the ex parte aspect. I did appear at the third circuit argument. I introduced Mr. Unger and moved his admission to the third circuit, and I was present when I heard the questions that Judges Van Dusen and Aldisert put to Mr. Unger.

Senator **Specter**. Justice Moore, to be absolutely certain—and it is repetitious—but are you certain that Mr. Unger said that he had initiated the meeting with Judge Gartner?

Justice **Moore**. Well, let me say, Senator, I cannot be certain that he said he initiated the meeting as such, but he certainly initiated the subject; I never had any doubt that the subject matter, that the motivating force in bringing the subject matter to Judge Gartner was from Mr. Unger, and he made that clear to me.

Senator **Metzenbaum**. Did he sound somewhat prideful in the fact that he had been able to achieve this result by this action on his part?

Justice **Moore**. In responding to that, Senator—and I want to be very careful in the way I respond to it—I believe that Mr. Unger felt that he had scored a tremendous legal coup.

Senator **Metzenbaum**. Legal coup?

Justice **Moore**. Yes, sir.

Senator **Specter**. Justice Moore, I have been asked to ask you this question: Mr. Unger testified earlier that he did not and would not have gone to Judge Gartner on his own because it was too high a risk. And the reason for that is that Mr. Unger said he was doing all right in Ohio, and he was concerned that if Judge Gartner had studied the bankruptcy court's decision in Delaware that a trustee was needed, that Judge Gartner might have concluded that he should appoint a trustee in the Ohio cases in the place of Mr. Unger as attorney for the debtor.

Justice MOORE. As I indicated——

Senator SPECTER. Do you feel that this is an accurate interpretation of Mr. Unger's position at that time?

Justice MOORE. I was surprised to hear it because, as I indicated, Mr. Unger at that stage felt that he had the complete and total confidence of Judge Gartner—and in fact, I remember we talked about this—Mr. Unger told me that Judge Gartner had made it very clear that they could appoint trustees in Delaware, but he was not going to appoint any trustee in Ohio. And I do not think that that issue, as far as I can recall, was ever a genuine problem by June of 1977. I think that Mr. Unger had fought an uphill battle to get Judge Gartner's confidence, but by that time, I believe he was making it very clear that Judge Gartner was not going to do the same things in Ohio that had occurred in Delaware.

Senator SPECTER. Did you testify that you withdrew from this case?

Justice MOORE. Yes, sir, I did.

Senator SPECTER. And what were the circumstances of your withdrawal?

Justice MOORE. In January, I was out of town attending depositions in another matter unrelated to this, and my secretary told me by phone that Mr. Micheal Kohn, Mr. Unger's young associate, had brought certain documents signed by Mr. Unger, seeking to disqualify Alton Tybout as counsel for the trustee, because Mr. Tybout then had a young associate in his firm who previously had been associated with my old law firm of Killoran & Van Brunt. And specifically, I learned that Mr. Unger had signed an affidavit dated January 19, 1980, which stated, in pertinent part—and I am reading from Mr. Unger's affidavit filed in the U.S. District Court for the District of Delaware, and signed and dated on January 19, 1980—and he said:

> At the time of the appointment of Mr. Tybout as special trial counsel for the trustee, I was unaware of the presence of Mr. Elzufon in his office. I was not informed that Mr. Moore had "approved"' on behalf of Unit, Inc. Mr. Tybout's representation of the trustee in the action against Unit, despite Elzufon's association with Mr. Tybout's firm.

There were other affidavits filed by Mr. Kohn and by Mr. B. W. Morris, who was the chairman of Unit, Inc., which were to the same effect. Mr. Unger also signed the motion himself, and he said:

> Unit, Inc., hereby moves the court for an order disqualifying F. Alton Tybout from further participation in this litigation on the grounds that such participation raises either an actual conflict of interest or the appearance of conflict of interest.

And there was also a brief filed, signed by Mr. Unger, where he said:

> In the instant case, Tybout has been retained to represent a fiduciary, the trustee of FRIEDCO's estate. As previously mentioned, the potential conflict was not rasied in the application presented to the bankruptcy court. The trustee recently advised one of Unit's counsel that he had obtained clearance from local counsel prior to presenting the application to the bankruptcy court.

This was saying that I had approved Mr. Tybout as counsel for the trustee. But then, the brief goes on to say, "However, Unit and its Chapter 11 court were not consulted and did not knowingly waive the right to object to this ethical conflict."

Well, I must say that when I got back to my office and read that, I was quite shocked, and I sent Mr. Unger a letter, dated January 30, 1980——

Senator SPECTER. Justice Moore, we would like to put in the record the legal document you have already described.

Justice MOORE. Yes, sir. In fact, I have a whole set of all the documents I am referring to here, which I am prepared to submit for the record.

Senator SPECTER. All right. Without objection, we will make them a part of the record.

[The following were received for the record:]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON,
DELAWARE, LTD.,
a Texas limited partnership
Debtor-in-Possession under
Chapter XII of the
Bankruptcy Act of the United
States,

and

UNIT, INC.,
a Texas corporation, Debtor-
In-Possession Under Chapter
XI of the Bankruptcy Act
of the United States,

Plaintiffs

v.

The Farmers Bank of the
State of Delaware,

Defendant

Civil Action No. 76-149

AFFIDAVIT OF SHERMAN E. UNGER

State of Ohio)
)SS
County of Hamilton)

Sherman E. Unger, being first duly sworn, states as follows:

1. I am an attorney at law, admitted to practice before the Supreme Court of the United States, the highest Courts for the State of Ohio and the District of Columbia, and various Federal courts in these jurisdictions. I am counsel for Unit, Inc. in the above captioned litigation and am designated trial counsel in Unit's Chapter XI proceedings before the United States Bankruptcy Court for the Southern District of Ohio, Western Division.

2. I was present with B.W. Morris, chairman of Unit, Inc., when John A. Elzufon introduced himself as having formerly worked with Andrew G.T. Moore, II on this case.

3. At the time of the appointment of Mr. Tybout as special trial counsel for the Trustee, I was unaware of

the presence of Mr. Elzufon in his office. I was not informed that Mr. Moore had "approved" on behalf of Unit, Inc. Mr. Tybout's representation of the Trustee in the action against Unit, despite Mr. Elzufon's association with Mr. Tybout's firm.

FURTHER AFFIANT SAYETH NAUGHT.

Sherman E. Unger
Sherman E. Unger

Sworn to and subscribed before me this 19th day of January, 1980.

Margo L. Knight (Betz)
Notary Public

MARGO L. BETZ Knight
Notary Public, State of Ohio
My Commission Expires Aug. 13, 1983

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON,
DELAWARE, LTD.,
a Texas limited partnership
Debtor-in-Possession under
Chapter XII of the
Bankruptcy Act of the United
States,

and

UNIT, INC.,
a Texas corporation, Debtor-
In-Possession Under Chapter
XI of the Bankruptcy Act
of the United States,

Plaintiffs

v.

The Farmers Bank of the
State of Delaware,

Defendant

Civil Action No. 76-149

AFFIDAVIT OF MICHAEL G. KOHN

State of Ohio)
)SS
County of Hamilton)

Michael G. Kohn, being first duly sworn, states as follows:

1. I am an attorney at law, admitted to practice before the highest Court of the State of Florida, New Jersey and Ohio, as well as the highest Court for the District of Columbia. I am also admitted to practice before various United States District Courts in those jurisdictions and the United States Courts of Appeals for the Third, Fifth, and Sixth Circuits.

2. I am associated with Sherman E. Unger, in the practice of law. Sherman E. Unger is the designated trial attorney for Unit, Inc. in its Chapter XI proceedings before the United States Bankruptcy Court for the Southern District of Ohio, Western Division and is counsel for Unit, Inc. in the above captioned litigation. I have participated in both this litigation and Unit's Chapter XI proceedings with Mr. Unger.

3. On Tuesday, January 15, 1980, John A. Elzufon was introduced to me by Paul P. Welsh during a break in the deposition of Robert E. Hickman. Mr. Elzufon and I had not previously been introduced and, at the time of our introduction by Mr. Welsh, Mr. Elzufon believed I was associated with Mr. Welsh. Mr. Elzufon made some comments prior to our formal introduction from which I was able to conclude that he had previously participated in this litigation as counsel for Unit.

4. At the time F. Alton Tybout was appointed special trial counsel for the Trustee of Freidco's estate, I was unaware of the connection between Mr. Elzufon and Mr. Tybout and was further unaware that Andrew G.T. Moore, II had "approved" Mr. Tybout's participation as counsel for the Trustee despite Mr. Elzufon's association with that firm.

FURTHER AFFIANT SAYETH NAUGHT.

Michael G. Kohn

Sworn to and subscribed before me this 19th day of January, 1980.

Notary Public

MARGO L. BETZ
Notary Public, State of Ohio
My Commission Expires Aug. 13, 1983

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON,
DELAWARE, LTD.,
a Texas limited partnership
Debtor-in-Possession under
Chapter XII of the
Bankruptcy Act of the United
States,

and

UNIT, INC.,
a Texas corporation, Debtor-
In-Possession Under Chapter
XI of the Bankruptcy Act
of the United States,

Plaintiffs

v.

The Farmers Bank of the
State of Delaware,

Defendant

Civil Action No. 76-149

AFFIDAVIT OF B.W. MORRIS

State of Ohio)
)SS
County of Hamilton)

B.W. Morris, being first duly sworn, states as follows:

1. I am the chairman of Unit, Inc., a Debtor-in-Possession in proceedings under Chapter XI of the Bankruptcy Act, pending before the United States Bankruptcy Court for the Southern District of Ohio, Western Division.

2. On January 16, 1980, I appeared at the office of F. Alton Tybout for my deposition in the above captioned case. At some point during that day, John A. Elzufon came up to me and introduced himself to me, recalling that he had previously worked with Drew Moore on this case.

3. At the next convenient break, I inquired of my attorney, Sherman E. Unger, how Mr. Tybout could represent the Trustee in his action against Unit when one of Unit's former attorneys worked for him.

4. Prior to our meeting, neither I nor any other employee of Unit, Inc., had ever been informed of this relationship between Mr. Tybout and Mr. Elzufon.

FURTHER AFFIANT SAYETH NAUGHT.

William

B.W. Morris

Sworn to and subscribed before me this 19th day of January, 1980.

Margo L. Knight (Betz)

Notary Public

MARGO L. BETZ KNIGHT
Notary Public, State of Ohio
My Commission Expires Aug. 13, 1983

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON, DELAWARE, LTD., a Texas limited partnership Debtor-in-Possession under Chapter XII of the Bankruptcy Act of the United States,

and

UNIT, INC., a Texas corporation, Debtor-In-Possession Under Chapter XI of the Bankruptcy Act of the United States,

Plaintiffs

v.

The Farmers Bank of the State of Delaware,

Defendant

Civil Action No. 76-149

NOTICE OF MOTION

TO:

Max S. Bell, Jr., Esquire
Richards, Layton & Finger
4072 DuPont Building
P.O. Box 551
Wilmington, Delaware 19899

Peter J. Walsh, Esquire
300 Delaware Avenue
P.O. Box 949
Wilmington, Delaware

Paul P. Welsh, Esquire
Morris, Nichols, Arsht & Tunnel
12th & Market Streets
Wilmington, Delaware 19899

F. Alton Tybout, Esquire
Tybout, Redfearn, Casarino & Pell
P.O. Box 2092
Wilmington, Delaware 19899

Thomas G. Hughes, Esquire
O'Donnell & Hughes
P.O. Box 2214
Wilmington, Delaware 19899

PLEASE TAKE NOTICE that the within Motion to Disqualify F. Alton Tybout, Esquire, will be present to the Honorable Walter K. Stapleton at a time to be scheduled by the Court.

Respectfully submitted,

Sherman E. Unger

Sherman E. Unger
Michael G. Kohn
2820 Dubois Tower
Cincinnati, Ohio 45202
Attorneys for Unit, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON,
DELAWARE, LTD.,
a Texas limited partnership
Debtor-in-Possession under
Chapter XII of the
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and

UNIT, INC.,
a Texas corporation, Debtor-
In-Possession Under Chapter
XI of the Bankruptcy Act
of the United States,

Plaintiffs

v.

The Farmers Bank of the
State of Delaware,

Defendant

Civil Action No. 76-149

MOTION TO DISQUALIFY

Unit, Inc. hereby moves this Court for an Order Disqualifying F. Alton Tybout, Esquire from further participation in this litigation on the grounds that such participation raises either an actual conflict of interest or the appearance of a conflict of interest.

This Motion is accompanied by the Affidavit of Michael G. Kohn and the Memorandum of Law.

Respectfully submitted,

Sherman E. Unger

Sherman E. Unger
Michael G. Kohn
2820 Dubois Tower
Cincinnati, Ohio 45202
Attorneys for Unit, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON,
DELAWARE, LTD.,
a Texas limited partnership
Debtor-in-Possession under
Chapter XII of the
Bankruptcy Act of the United
States,

and

UNIT, INC.,
a Texas corporation, Debtor-
In-Possession Under Chapter
XI of the Bankruptcy Act
of the United States,

Plaintiffs

v.

The Farmers Bank of the
State of Delaware,

Defendant

Civil Action No. 76-149

BRIEF OF UNIT, INC. IN SUPPORT OF ITS MOTION TO DISQUALIFY F. ALTON TYBOUT, ESQUIRE

Canon 9 of the Code of Professional Responsibility provides that "a Lawyer Should Avoid Even the Appearance of Professional Impropriety." Canon 4 teaches that "a Lawyer Should preserve the Confidences and Secrets of a Client." It is respectfully submitted that further participation in these proceedings by F. Alton Tybout constitutes a breach of the ethical precepts encompassed by Canon 4 and 9 and, accordingly, his disqualification is required.

FACTUAL BASIS

When this action was commenced, Unit, Inc. ("Unit") and Freidco of Wilmington, Deleware, Ltd. ("Freidco") were coplaintiffs, jointly represented by Sherman E. Unger ("Unger") of Cincinnati, Ohio and Andrew G.T. Moore, II ("Moore") of the firm of Killoran & Van Brunt. One of Moore's associates at that time was an attorney named John Elzufon ("Elzufon"). During that association, Elzufon participated in this case, representing the interests of Unit. Elzufon was a principal draftsman of Unit's (and Freidco's) Brief in Opposition to Defendants' Motion to Dismiss the Complaint. He was familiar with the facts alleged in the Complaint and possessed the confidences and secrets of Unit.

Elzufon terminated his association with Moore in the Killoran firm and is presently associated with F. Alton Tybout ("Tybout") in the firm of Tybout, Redfearn, Casarino & Pell. After the appointment of Peter J. Walsh as the Trustee of Freidco's estate, Tybout was appointed trial counsel for the Trustee by Freidco's Chapter XII Court. The Trustee's application did not disclose Elzufon's position in Tybout's firm although the application stated that Trustee v. Unit, Inc. would be among Tybout's duties. This litigation has continued with Unit and Freidco being separately represented. Unit continues to be represented by Unger and Moore, who has since become a partner in the firm of Connolly, Bove & Lodge.

The factual basis of the claims set forth in Counts 1-3 of the Bank Holding Company action is identical to that of the claims set forth in the Trustee's claim against Unit, although the legal theories differ. Compare ¶¶ 3-5 of Trustee's Claim with ¶¶ 32-39 of Amended Complaint. Both actions involve withdrawal by Farmers of $155,000.00 from Freidco's account at Farmers' Bank from April, 1974 through September, 1975. See Opinion of this Court, 12/14/79, at 1.

ARGUMENT

In order to protect the confidences and secrets of a client, a lawyer may not ethically participate in litigation against his former client if the subject matter of the litigation is substantially related to the subject matter of the prior representation. See, e.g., Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976); American Roller Co. v. Budinger, 513 F.2d 982 (3rd Cir. 1975); Hull v. Celanese Corp., 513 F.2d 568 (2nd Cir. 1975); Emle v. Industries v. Patentex, 478 F.2d 562 (2nd Cir. 1973); T.C. Theater Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265 (S.D.N.Y. 1953). The same rule is applied where an attorney's affiliation switches during litigation. See Dean v. American Security Insurance Co., 429 F.Supp. 3 (N.D. Ga. 1976). Moreover, if one lawyer in a firm is disqualified by reason of such prior representation, all members of that firm must be disqualified. See Schloetter v. Railoc of Indiana, Inc., supra; Laskey Bros. v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2nd Cir. 1955). Elzufon's prior representation of Unit in this case requires Tybout's withdrawal.

> "The rationale underlying Canon 4 is the principle that a client should be encouraged to reveal to his attorney all possibly pertinent information. . . .A client should not fear that the confidences conveyed to his attorney in one action will return to haunt him in a later one."

Richardson v. Hamilton International Corp., 469 F.2d 1382, 1384 (3rd Cir. 1972). That same rationale is surely designed as well to assuage a client's fear that his confidences will return to haunt him in the very same action in which they were conveyed.

The existence of an attorney-client relationship "raises an irrefutable presumption that confidences were disclosed" to the attorney by his client. Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 608 (8th Cir. 1977). Because of the close relationship existing among legal partners and their associates, there exists a further presumption that those confidences were disclosed to other lawyers in the firm. See, e.g., United States v. Kitchen, 592 F.2d 900 (5th Cir. 1979); Westinghouse Electric Co. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978); Fund of Funds, Ltd.

v. Arthur Anderson & Co., 567 F.2d 225 (2nd Cir. 1977). Fidelity to the dictates of Canon 4, then, requires that Tybout proceed no further in this litigation.

Canon 9 has been described by one Court as follows:

> "That no unethical or untoward act may have occurred is implied in the Canon's emphasis of "appearance." The conduct under scrutiny must therefore be evaluated in an "eye of the beholder" context, and the lawyer must be disqualified when an actual appearance of evil exists, though there may be no proof of actual evil."

Fred Weber, Inc. v. Shell Oil Co., supra at 609 (emphasis supplied). See also Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976); General Motors Corp. v. City of New York, 501 F.2d 639 (2nd Cir. 1974). Thus, Tybout may be disqualified even though he has not been involved in actual wrongdoing.

As the Second Circuit has stated:

> "The 'public's trust' is the raison d'etre for Canon 9's 'appearance-of-evil' doctrine. Now explicitedly incorporated in the profession's ethical Code, this doctrine is directed at maintaining, in the public mind, a high regard for the legal profession. . . .
>
> "[T]he Code of Professional Responsibility is not designed for Holmes' proverbial 'bad man' who wants to know just how many corners he may cut, how close to the line he may play, without running into trouble with the law. . . .Rather, it is drawn for the 'good man' as a beacon to assist him in navigating an ethical course through the sometimes murky waters of professional conduct."

General Motors Corp. v. City of New York, supra at 649 (citation ommitted) It is difficult, if not impossible, to explain to a client how an attorney can be allowed to sue him over a matter in which another lawyer, presently employed by that adversary, had previously represented the client's interest. Clients are not trained in the niceties of the law. They do not understand and, in fact, are distrustful of, the subtle distinctions often drawn by lawyers in matters such as this. It is for that very purpose that the Code of Professional Responsibility requires disqualification at the level of appearance, rather than demonstration, of impropriety.

It is also for such reasons that the majority of courts have resisted even good faith attempts to erect a "Chinese wall" between a lawyer who clearly would not be permitted to participate in litigation against a former client and the other members of his firm. United States v. Kitchin, supra; Westinghouse Electric v. Kerr-McGee Corp., supra; Schloetter v. Railoc of Indiana, Inc., supra; Fund of Funds, Ltd. v. Arthur Anderson & Co., supra. This is not to suggest that such a wall cannot, in fact, be built, but only that such a wall can not overcome the appearance of impropriety. Schloetter v. Railoc of Indiana, Inc., supra.*

Two cases most closely approximate the factual situation present in the instant case. United States v. Kitchin, supra; Dean v. American Security Insurance Co., supra. In Dean, one of the plaintiff's attorneys, W. LaRue Boyce, was a former employee of Defendant. Both Plaintiff and Boyce were in the same department of Defendant's company, Boyce earning his law degree during the term of that employment. Dean v. American Security Insurance Co., supra at 4.

The litigation grew out of employment difficulties between Plaintiff and Defendant. Both the Plaintiff and Boyce were employed under the same supervisor. While employed by Defendant, Boyce had discussions with that supervisor about Plaintiff's employment problems. The Court concluded that Boyce could not switch sides, following the termination of his employment with Defendant, and represent Plaintiff in the litigation. Id. at 5.

In Kitchin, an attorney by the name of Ludwick was employed as an Assistant United States Attorney for the North District of Georgia. During a criminal proceeding against a Defendant named Stokes, an attempt was apparently made to influence the United States Attorney for that District. Ludwig represented the government at hearings regarding the attempted influence and, in preparation for that hearing, became aware of Kitchin's role in that alleged attempt. Ludwig held various discussions with other Assistants regarding the propriety of the United States Attorney's Office for the Northern District of Georgia continuing in the prosecution of Stokes. United States v. Kitchin, supra at 902-03.

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*The Second Circuit and the Seventh Circuit, in a later case, have now held that such a wall cannot be built. Westinghouse Electric Corp. v. Kerr-McGee Corp., supra at 1321; Fund of Funds, Ltd. v. Arthur Anderson & Co., supra at 229 n.10.

Kitchin then left the United States Attorney's Office and accepted employment as an associate of Taylor W. Jones. Approximately 3 months later, Defendant Kitchin was indicted for his role in the attempted bribery of the United States Attorney. Jones, Ludwig's employer, was retained by Kitchin to prepare his defense. There was no evidence that Ludwig's employment with Jones was in any way related to the case and Ludwig was to be totally isolated from the case by Jones. Id. at 903.

Upon motion of the United States Attorney, the District Court disqualified Jones from the case. Id. at 905. The Court of Appeals for the Fifth Circuit affirmed. Id. at 902. Despite the implication of a criminal Defendant's Sixth Amendment rights, a factor not present here, the Courts involved concluded that the requirements of Canons 4 and 9 outweighed Defendant's right to go to trial with counsel of his choice, in order to prevent "suspicion and distrust of the judicial process." Id. at 905.

In the instant case, Tybout has been retained to represent a fiduciary, the Trustee of Freidco's estate. As previously mentioned, the potential conflict was not raised in the Application presented to the Bankruptcy Court. The Trustee recently advised one of the Unit's counsel that he had obtained clearance from local counsel prior to presenting the Application to the Bankruptcy Court. However, Unit and its Chapter XI Court were not consulted and did not knowingly waive the right to object to this ethical conflict.

In International Business Machines v. Levin, 579 F.2d 271 (3rd Cir. 1978), the Court was confronted with the issue of whether, and to what extent, disclosure of a conflict situation would prevent disqualification. Although the law fir in that case was continuing to represent I.B. M. during the time it was attempting to sue it in an unrelated matter, the analysis of the Court is applicable to this case. The Third Circuit concluded that full disclosure was required. Such disclosure was not made to Unit, its Chapter XI Court or its Cincinnati counsel. Accordingly, it is respectfully submitted that Unit could not have knowingly waived its right to object to Tybout's representation of the Trustee in the litigation against it.

Unit does not suggest that Tybout, or the Trustee, acted with bad motive. However, the past relationship between Unit and Elzufon requires

> "application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from [Unit] during a previous relationship may subsequently be used to [Unit's] disadvantage."

Emle Industries, Inc. v. Patentex, Inc., supra at 571.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that F. Alton Tybout, Esquire must be disqualified from further participation in this case as counsel for the Trustee of the Estate of Freidco of Wilmington, Delaware, Ltd.

Sherman E. Unger

Sherman E. Unger
Michael G. Kohn
2820 Dubois Tower
Cincinnati, Ohio 45202
Attorneys for Unit, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of Unit's Motion For Disqualification of F. Alton Tybout, Esquire, Brief in Support, and Affidavits in Support upon Max S. Bell, Jr., Peter J. Walsh, Paul P. Welsh, F. Alton Tybout, Thomas G. Hughes, by hand delivery this 21st day of January, 1980.

Michael G. Kohn

ARTHUR G. CONNOLLY
JANUAR D. BOVE, JR.
NATHAN BAKALAR
THOMAS S. LODGE
JACOB C. KELLEM
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January 30, 1980

Sherman E. Unger, Esquire
2724 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Re: Freidco v. Farmers Bank

Dear Sherman:

I have returned to the office earlier this week than I expected and have now had an opportunity to review the motion to disqualify Alton Tybout, its supporting affidavits and legal memorandum. It is an understatement to say that I am surprised at their content.

Under no circumstances, would I unilaterally "approve" the appointment of Alton Tybout without prior consultation with you, and I recall that we discussed Peter Walsh's application seeking Alton's appointment in considerable detail. You may also recall that you and I attended the hearing before Judge Balick when the application to hire Mr. Tybout was presented. At that time, you and I represented to the court that we had no objection to Alton's appointment, which was approved by the court on August 15, 1978. ✓

I have no recollection of Alton Tybout's calling me to ask if I had any problem with John Elzufon's presence in his office. If it did occur, I would certainly have discussed it with you. In any event, I do recall that one of the points that you and I discussed in advance of Alton's appointment was that John Elzufon was then associated with Tybout & Redfearn.

In fact, months before Alton was appointed I advised you that John Elzufon was in Alton Tybout's firm. You have undoubtedly forgotten my letter to you of February 23, 1978, wherein I stated on Page 8:

> "...One of the finest and most successful tort lawyers in this state is Alton Tybout. John Elzufon is now an associate of his firm." (Emphasis added.)

Thus, I am concerned about the sworn statement in Paragraph 3 of your affidavit filed in support of the motion to disqualify Alton Tybout:

> "At the time of the appointment of Mr. Tybout...I was unaware of the presence of Mr. Elzufon in his office".

I think it is unfortunate that this matter has been raised at such a late stage in the proceedings. On September 17, 1979, I had a telephone conversation with Mike Kohn wherein he asked that I not take any position on the trustees' application to amend the order appointing Mr. Tybout nunc pro tunc and on September 19, 1979, Jim Green wrote Judge Balick to that effect. I have a contemporaneous memorandum in my file with respect to this conversation with Mike Kohn. Even by that date, everyone including you and Mike were well aware of John Elzufon's association with Alton Tybout.

Under the circumstances, I cannot join in the motion to disqualify Alton. He was appointed with the knowledge of you and me that John Elzufon was in his firm. We were both present in court and supported the appointment of Alton at the hearing before Judge Balick on August 15, 1978.

Naturally, if you feel that you must pursue this motion, I will be forced to withdraw as counsel. If any allegations remain in the motion that you were unaware of John Elzufon's association with Mr. Tybout at the time of Alton's appointment on August 15, 1978, then I will be forced to disclose the content of my letter to you of February 23, 1978. I would truly prefer to avoid doing so for many reasons, not the least of which is that at the present time that letter is clearly covered by the attorney-client privilege. Yet the motion, as it is presently cast with supporting affidavits, clearly constitutes a waiver of this privilege, requiring full disclosure to the court. In this regard, I call your attention to Disciplinary Rules 4-101(C) and 7-102(B).

When I returned to the office today, I found the enclosed documents from Alton Tybout. They are:

1. Letter dated January 23, 1980, to me from Alton Tybout;
2. Letter dated January 23, 1980, to Mike Kohn from Alton Tybout;
3. Motion to Strike Unit's Motion to Disqualify served on the parties on January 21, 1980;
4. Proposed affidavit of F. Alton Tybout.

I urge all of you to carefully review the position being taken. Frankly, I think that the damage it will do to the Freidco estate in the way of further delays and expense is far outweighed by the technical arguments advanced (and supported by erroneous facts), than John Elzufon's former association with Killoran & VanBrunt. As far as I can recall, he was not privy to any confidential information regarding the Freidco and Unit matters. His work was primarily as a draftsman of briefs opposing the appointment of a trustee and in opposition to the first motion of Farmers Bank to dismiss certain claims in the One Bank Holding Company case.

I hope that you have fully assessed all of the implications of this motion.

If I can reach him later today, I am going to advise Alton Tybout that I cannot join in the motion and am now awaiting further word from you.

Very truly yours,

Drew

Andrew G. T. Moore, II

AGTM/mhm
Encl.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In the Matter of:) BK No. 76-49
)
FREIDCO OF WILMINGTON)
DELAWARE, LTD., a) August 15, 1978
limited Partnership,)
)
Debtor) Oral Argument

APPEARANCES:

CONNOLLY, BOVE & LODGE
By: ANDREW G. T. MOORE, II, ESQ.,
for the Debtor.

SHERMAN E. UNGER, ESQ.
and
MICHAEL G. KOHN, ESQ.
for the Debtor.

RICHARDS, LAYTON & FINGER
By: DANIEL L. KLEIN, ESQ.
For the Farmers Bank of the State of Delaware.

MORRIS, NICHOLS, ARSHT & TUNNELL
By: PAUL P. WELSH, ESQ.,
for Robert E. Hickman and Harry B. Tingle.

MURDOCH & WALSH
By: PETER J. WALSH, ESQ.
for the Trustee.

ARGUMENT ON MOTION TO STRIKE AND UNIT, INC.'s
MOTION TO DISMISS

White & Corbett
Registered Professional Reporters
409 Beneficial Bldg. Wilmington, DE 19801
(302) 571-0510

THE COURT: Good morning, gentlemen. I believe we have on our schedule for this morning motions to strike -- cross motions to strike, that is -- and a motion to dismiss the Trustee's complaint filed by Unit. In addition, last week Mr. Walsh asked the Court if it would consider his application for authority to employ additional counsel under general retainer. I told Mr. Walsh that I would consider this and asked that he notify other counsel, and I believe he has done so. My letter to each of you as to the matters to be heard today indicated I would take the cross motions first and then the motion to dismiss.

I think perhaps it might be well to consider Mr. Walsh's application first and then the cross motions and the motion to dismiss. Mr. Walsh.

MR. WALSH: Your Honor, I really don't have anything new to add other than add to what is in the application. I think the application says everything I want to say. I will briefly summarize it by saying that in light of the developments over the last year, I think that we have to get some significant developments, we have to get some major issues resolved and only after those matters are resolved, some of the major issues resolved or clearly defined as to the amount, will we then be in a position to talk about a plan of arrangement.

I would like to retain additional counsel to help speed things along and resolve the major issues. In particular, I would like to move as quickly as possible in the three adversary proceedings identified in the application, and I plan to move first in the direction of a resolution of the NBC claim, if priority is to be given to any of those three.

THE COURT: Thank you, Mr. Walsh. Mr. Moore.

MR. MOORE: We don't have any objection to the proposal, your Honor.

THE COURT: Mr. Welsh.

MR. WELSH: Your Honor, it is my view -- I certainly have no objection to the retention of Mr. Tybout, who is an able and aggressive attorney. I have reservations about whether at this time that retention should be on a general retainer. In my view it is perfectly appropriate, if Mr. Walsh feels the need, to have Mr. Tybout to undertake the National Bank of Commerce work. I have no objection to that. I think as to the other two matters that there is some hope that events may happen on the cross motions to strike and, as a result thereof, which will make it unnecessary to have additional counsel get into the action against Unit and the Farmers Bank action at this time.

I say that because of two things. One, I feel that a serious effort should be made to settle the Farmers Bank problem, and there have been some sort of tentative efforts to do it up until now which have not borne any fruit. But I feel that there is a reasonable possibility that a further more serious effort ought to be made, and before counsel are to undertake hammer-and-tong litigation of it all.

I think also on the Unit matter that there are consequences that flow from the motions to strike, if they are decided the way I hope they might be, which also might render activity by Mr. Tybout on that front not necessary at this time. And I would accordingly suggest that the application of the Trustee be granted with respect to the National Bank of Commerce matter and that there be some postponement of not great length, a month or two, of the question of Mr. Tybout's getting into this broader arena. That is my position, your Honor.

THE COURT: Mr. Klein.

MR. KLEIN: We have no objection to Mr. Walsh's motion.

THE COURT: Mr. Moore.

MR. MOORE: I said we have no objection and I repeat that, except that I would point out that in this regard it seems to us that the Trustee should have the necessary discretion that he seeks in the order. And while Mr. Welsh may have made some points that would be pertinent in another context, that as things stand today it would be wiser to let the Trustee decide how he is going to move these matters along with the help of Mr. Tybout.

THE COURT: Thank you, Mr. Moore.

Mr. Walsh.

MR. WALSH: Your Honor, I indicated already that of the three principal adversary proceedings the NBC claim I want to move on immediately. I would like the order in the fashion I submitted it, notwithstanding Mr. Welsh's objections, and I would hope that if I could smell, so to speak, significant developments which would obviate Mr. Tybout's full-blown efforts in the other two cases, I could control that effort as things develop. But I would prefer to have the order read the way I have presented it and proceed in my discretion on the other two actions, depending on how things develop, including, as Mr. Welsh noted, what develops out of the cross motions to strike today.

THE COURT: Thank you, Mr. Walsh. It seems to me that Mr. Walsh's application should be granted as prayed for. I am certain that he will use discretion in moving the matters along. The application is granted.

The first motion to strike was filed February 24th and that was on behalf of the attorneys for the defendant Freidco of Wilmington, Delaware. The next was filed by Hickman and Tingle's attorneys on March 13, and then the next was filed March 17th on behalf of Unit, Inc., and Freidco of Wilmington,

MEMORANDUM

TO: JSG

FROM: AGTM

RE: Freidco Reorganization Proceedings

DATED: September 17, 1979

On Wednesday, September 19, 1979, there has been a brief hearing scheduled before Judge Helen S. Balick at 4:00 p.m. to consider a motion by the trustee to amend an earlier order nunc pro tunc confirming the appointment of the trustee's counsel.

As I understand it from a telephone conversation I had with Michael Kohn this morning, they do not want us to take any position on the motion. However, if that changes, Mike will be in touch with us.

Unfortunately, I have to be in California on Wednesday and would appreciate it if you could attend this brief hearing to advise Judge Balick that we take no position on the trustee's application. If you are unable to attend, could you arrange to have a letter sent to the court to this effect and apologize for our absence.

AGTM/mhm

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RICHARD T. FOSTER (VA. BAR)
REGINALD J. BUTAT (MD. BAR)

September 19, 1979

BY HAND

The Honorable Helen S. Balick
Bankruptcy Court
844 King Street
Wilmington, Delaware 19801

Re: Friedco of Wilmington, Delaware, Ltd.
BK No. 76-49

Dear Judge Balick:

Mr. Moore is out of the State this week, but left word for me to try to attend this afternoon's hearing before Your Honor regarding the Trustee's motion to amend the Orders appointing counsel for the Trustee. I must apologize that I, too, am unable to attend because of a previously scheduled trial.

I trust that this letter will suffice to advise the Court that we take no position with regard to the Trustee's Application.

Respectfully yours,

JAMES S. GREEN

JSG/lzm
cc: Max S. Bell, Esquire
Steven D. Goldberg, Esquire
Robert Goldberg, Esquire
Irving Morris, Esquire
Paul P. Welsh, Esquire
Sherman E. Unger, Esquire
Thomas G. Hughes, Esquire

MEMORANDUM TO FILE

RE: Freidco v. Farmers Bank, C.A. No. 76-149.

DATED: January 31, 1980

Upon returning to the office from Columbia, South Carolina, yesterday morning, I eventually had an opportunity to fully review Unit's motion with supporting affidavits and legal memoranda to disqualify Alton Tybout as trustee's counsel. After reviewing the Freidco files in an effort to refresh my recollection, I discovered the following:

1. On February 23, 1978, I wrote to Sherman Unger with respect to certain tangential matters in this litigation, which included the specific statement to him that John Elzufon was then associated with Alton Tybout.

2. On August 9, 1978, Peter Walsh advised us by letter of his application requesting authority to employ additional counsel. Since this letter was also sent directly to Sherman Unger, I did not forward it to him with any letter of enclosure. However, I distinctly recall that after Peter Walsh made his application for the appointment of Alton Tybout, I discussed this with Sherman Unger and we were in joint agreement that it would be very helpful for the trustee to be represented by experienced counsel such as Alton Tybout.

3. I know I reminded Sherman that Alton was the same lawyer I had recommended to him in my letter to him of February 23, 1978.

4. At the hearing before Judge Balick on August 15, 1978, Sherman Unger, Michael Kohn and I attended. Among the issues presented to Judge Balick was the appointment of Alton Tybout as

counsel. Because we had agreed in advance that this appointment would likely be advantageous, I was authorized, and in fact did advise the court on the record with both Sherman and Michael Kohn present that we supported the application of the trustee to retain Mr. Tybout.

Unfortunately, there is nothing in the file to assist in refreshing my recollection that either Peter or Alton discussed a potential conflict of interest with me prior to Alton's appointment. If it did occur, I would certainly have referred to it to Sherman before making any commitment. It is clear from the correspondence file that no decisions were made by me concerning even the remotest problems of a conflict without referring them to Sherman. For example, on September 28, 1978, Peter Walsh wrote me that he proposed to lease certain space in the Farmers Bank building to his brother, Jim, and on October 2, 1978, I immediately referred the matter to Sherman by my letter to him of that date.

I also noted from the files that on September 17, 1979, I had a telephone call from Michael Kohn requesting that we not take any position on the trustee's motion to amend the August 15, 1978, order appointing Alton Tybout nunc pro tunc. Thereafter on September 19, 1979, James Green wrote Judge Balick advising her of this view.

Late yesterday afternoon, I called Mike Kohn and advised him of the existence of the letter to Sherman of February 23, 1978, particularly the reference to John Elzufon's association with Alton Tybout. Mike claimed he knew nothing about it and somehow seemed to feel that his small two man law office was so compartmentalized that Sherman's knowledge of this important material was somehow not binding on him. I told Mike that I trusted the statements in the affidavits were purely the product of error, but in any event they should be corrected. I also told him that I had written to Sherman yesterday referring him to my February 23, 1978, letter and urged Mike to carefully re-examine the situation.

I also reminded him of the September 17, 1979, phone call, which I remembered, and of our notification to the court on September 19, 1979, that we took no position with respect to amending the order appointing Alton Tybout. He acknowledged that he remembered those. I further reminded him that certainly by this date, he clearly had knowledge, even if he chose to compartmentalize Sherman's knowledge of the association of John Elzufon with Alton. Again, he admitted that he was certainly aware of the situation by that date.

Unless I somehow misunderstood Mike, it seemed to be his position that he had been "directed" to file the motion and seemed somewhat apologetic for the position in which he had placed everyone. I told him, as I had stated earlier in the phone conversation, that I could not join in this motion and was prepared to withdraw as counsel for Unit if it is pursued. I also fully apprised him of the contents of my letter to Sherman Unger of yesterday, including the fact that at the forthcoming hearing on February 4, I would be forced to disclose the existence and contents of my February 23, 1978, letter. I repeated that I hoped it would not be necessary, although I referred Mike to Disciplinary Rules 4-101(C) and 7-102(B).

Mike indicated that Sherman was out of the country and probably could not be reached by telephone. I told him that it certainly would be advisable to take whatever steps are necessary to get the record properly corrected, since it was clear that Sherman's affidavit, and perhaps his, were at best inaccurate.

Also, late yesterday afternoon, I called Alton Tybout and spoke with him briefly to advise him that I had now reviewed both the motion with supporting documents aimed at his disqualification as well as his proposed responses. I related to him that based on my review of the files, I could not join in the motion. He asked me whether I had found anything to refresh my recollection as to the background of the matter. I told him that I could find nothing that would aid me in recalling any conversation he and I may have had on the subject. However, I mentioned that I had located a letter dated February 23, 1978, clearly showing that Sherman Unger had knowledge of John Elzufon's association with Alton. However, I advised Mr. Tybout that I could not disclose the contents of this letter to him since I considered it subject to the attorney-client and work product privileges. I told him that Sherman ought to be given an opportunity to correct the record. Alton agreed. Nonetheless, if the motion is somehow pursued by Sherman or Mike Kohn, I indicated that I would probably have to withdraw as counsel and would then be required to disclose the contents of my February 23 letter, at least to the court.

AGTM/mhm

Freidco-LA

LAW OFFICES
CONNOLLY, BOVE & LODGE
FARMERS BANK BUILDING
P. O. BOX 2207
WILMINGTON, DELAWARE 19899
CABLE ADDRESS ARTCON
AREA CODE 302-658-9141
(TELEX 83-5477)

ARTHUR G. CONNOLLY
JANUAR D. BOVE, JR.
NATHAN BAKALAR
THOMAS S. LODGE
JACOB C. KELLEM
ALBERT F. BOWER
NICHOLAS E. OGLESBY, JR. (D. C. BAR)
JAMES M. MULLIGAN, JR.
ARTHUR G. CONNOLLY, JR.
RUDOLF E. HUTZ
F. L. PETER STONE
ANDREW G. T. MOORE, II
HAROLD PEZZNER
JOHN D. FAIRCHILD (MICH. BAR)
RICHARD M. BECK (D. C. BAR)

WERNER H. HUTZ
19[illegible]-1970

PAUL E. CRAWFORD
S. BERNARD ABLEMAN
STANLEY C. MACEL III
JAMES S. GREEN
N. RICHARD POWERS

LEWIS H. WILSON (ALA. BAR)
J. R. JULIAN
HENRY E. GALLAGHER, JR.
RICHARD T. FOSTER (VA. BAR)

January 31, 1980

M. & W., P.A.
JAN 31 1980

HAND DELIVER

The Honorable Walter K. Stapleton
U. S. District Court
Federal Building
844 King Street
Wilmington, Delaware 19801

Re: Freidco of Wilmington, Delaware, Ltd.
v. Farmers Bank - C.A. No. 76-149.

Dear Judge Stapleton:

Yesterday I returned to the office somewhat earlier than I anticipated and had an opportunity to review the pending motion with supporting affidavits and legal memoranda filed by Unit, Inc., seeking to disqualify the trustee's counsel, F. Alton Tybout, Esquire. All of these documents were filed with the court without my prior knowledge or consent. Late yesterday afternoon, I advised Mr. Unger by letter that I could not join in this motion, and accordingly, will not be signing it as local counsel for Unit. I also confirmed this by telephone calls, again late yesterday afternoon, to both Michael Kohn, Esquire, and Mr. Tybout.

If the motion is pursued, I will be available at the hearing before Your Honor on Monday, February 4, 1980, to make available to the court such facts and other information, presently known to me, respecting the subject matter of the pending motion to disqualify Mr. Tybout.

Respectfully yours,

Andrew G. T. Moore, II

AGTM/mhm

cc: Max S. Bell, Jr., Esquire
Thomas G. Hughes, Esquire
F. Alton Tybout, Esquire
Peter J. Walsh, Esquire
Paul P. Welsh, Esquire
Sherman E. Unger, Esquire
Michael G. Kohn, Esquire
Clerk, U.S. District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON, DELAWARE, LTD., a Texas limited partnership, Debtor-In-Possession under Chapter XII of the Bankruptcy Act of the United States, and UNIT, INC., a Texas corporation Debtor-In-Possession Under Chapter XI of the Bankruptcy Act of the United States,

Plaintiffs,

v.

Civil Action No. 76-149

THE FARMERS BANK OF THE STATE OF DELAWARE,

Defendant.

NOTICE OF MOTION TO WITHDRAW AS COUNSEL

TO: Max S. Bell, Jr., Esquire
Richards, Layton & Finger
4072 DuPont Building
P. O. Box 551
Wilmington, Delaware 19899

Michael G. Kohn, Esquire
2820 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Thomas G. Hughes, Esquire
O'Donnell & Hughes
904 Market Tower
P. O. Box 2214
Wilmington, Delaware 19899

F. Alton Tybout, Esquire
Tybout & Redfearn
Bank of Delaware Building
P. O. Box 2092
Wilmington, Delaware 19899

Sherman E. Unger, Esquire
2724 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Peter J. Walsh, Esquire
Murdock & Walsh, P.A.
300 Delaware Avenue
Wilmington, Delaware 19801

Paul P. Welsh, Esquire
Morris, Nichols, Arsht & Tunnell
1105 North Market Street
P. O. Box 1347
Wilmington, Delaware 19899

PLEASE TAKE NOTICE that the undersigned will present the attached motion to withdraw as counsel for Unit, Inc. in these matters at 9:00 a.m. on Monday, February 4, 1980.

Respectfully submitted,

A. G. T. Moore II

Andrew G. T. Moore, II
Connolly, Bove & Lodge
1800 Farmers Bank Building
P. O. Box 2207
Wilmington, Delaware 19899
Attorneys for Unit, Inc.

Dated: February 1, 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON,
DELAWARE, LTD., a Texas
limited partnership, Debtor-
In-Possession Under Chapter
XII of the Bankruptcy Act
of the United States, and
UNIT, INC., a Texas corpora-
tion Debtor-In-Possession
Under Chapter XI of the
Bankruptcy Act of the United
States,

Plaintiffs,

v. Civil Action No. 76-149

THE FARMERS BANK OF THE
STATE OF DELAWARE,

Defendant.

MOTION TO WITHDRAW

Andrew G. T. Moore, II and the firm of Connolly, Bove & Lodge, of which he is a partner, hereby move to withdraw as counsel for Unit, Inc. in these proceedings. The grounds therefo are set forth in the Affidavit of Andrew G. T. Moore, II, attache hereto as Exhibit 1.

Connolly, Bove & Lodge

By

1800 Farmers Bank Building
P. O. Box 2207
Wilmington, Delaware 19899
Attorneys for Unit, Inc.

Dated: February 1, 1980.

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON,)
DELAWARE, LTD., a Texas)
limited partnership, Debtor-)
In-Possession Under Chapter)
XII of the Bankruptcy Act)
of the United States, and)
UNIT, INC., a Texas corpora-)
tion Debtor-In-Possession)
Under Chapter XI of the)
Bankruptcy Act of the United)
States,)
)
Plaintiffs,)
)
v.) Civil Action No. 76-149
)
THE FARMERS BANK OF THE)
STATE OF DELAWARE,)
)
Defendant.)

AFFIDAVIT

STATE OF DELAWARE)
) SS.
NEW CASTLE COUNTY)

ANDREW G. T. MOORE, II, being duly sworn, does depose and say:

1. That I am a member of the bar of this court and a partner in the Wilmington law firm of Connolly, Bove & Lodge.

2. On January 21, 1980, while I was away from Wilmington attending depositions in another city, my secretary advised me by telephone that Michael G. Kohn, Esquire, Cincinnati counsel for Unit, Inc., had requested her to assist him in the serving and filing of a motion with accompanying affidavits and brief to disqualify F. Alton Tybout, Esquire, as counsel to the Trustee of Freidco of Wilmington, Delaware, Ltd. (Freidco). Later that day the Clerk of the United States District Court for the District of Delaware called my secretary and said that my signature would be

required on the moving papers, and until that was done, they could not be accepted for filing.

4. Shortly thereafter, my secretary reached me to report what had occurred. Since this matter was presented to the court without my prior knowledge or consent, I advised my secretary that the documents were not to be signed until I returned to Wilmington and could carefully review them.

5. On Wednesday, January 30, 1980, I returned to my office and saw the moving papers for the first time. After reviewing them, and comparing them with information in my files, I was able to determine that on February 23, 1978, I had written to Sherman E. Unger, Esquire, and included specific notice to him that John Elzufon, Esquire, was then associated with Mr. Tybout. While this communication arose out of events transpiring in the Freidco bankruptcy proceedings, it did not pertain to the appointment of Mr. Tybout as counsel for the trustee.

6. On August 9, 1978, Peter J. Walsh, Esquire, Freidco Trustee, wrote to various counsel in this matter, including Mr. Unger and me, concerning an application he would be making to the Honorable Helen S. Balick to employ additional counsel. Since this letter was also sent directly to Sherman Unger, I did not forward it to him with any letter of enclosure. However, I distinctly recall that after Peter Walsh made his application for th appointment of Alton Tybout, I discussed this with Mr. Unger and we were in joint agreement that Mr. Tybout's appointment should not be opposed. I also reminded Mr. Unger that Mr. Tybout was the same lawyer to whom I had referred in my letter to Mr. Unger of February 23, 1978, as well as the fact that Mr. Elzufon was associated with Mr. Tybout.

7. At the hearing before Judge Balick on August 15, 1978, Messrs. Unger, Kohn and I attended. Among the issues

presented to Judge Balick was the appointment of F. Alton Tybout as counsel. I was authorized, and,in fact, did advise the court on the record with Messrs. Unger and Kohn present, that we supported the application of the trustee to retain Mr. Tybout.

8. Unfortunately, there is nothing in my files to assist in refreshing my recollection that either Peter Walsh or F Alton Tybout discussed a potential conflict of interest with me prior to Mr. Tybout's appointment, and I do not recall any such discussion. Under no circumstances, would I have unilaterally waived any issue of a conflict without first referring it to Mr. Unger. It is clear from my files that no decisions were made by me concerning even the remotest problems of a conflict without referring them to Mr. Unger. For example, on September 28, 1978, the trustee wrote me that he proposed to lease certain space in the Farmers Bank building to his brother, and on October 2, 1978, I immediately referred that matter to Mr. Unger by letter of that date.

9. On September 17, 1979, I received a telephone call from Mr. Kohn requesting that we not take any position on the trustee's motion to amend nunc pro tunc Judge Balick's August 15, 1978 order appointing Mr. Tybout. Thereafter, on September 19, 1979, one of my partners, James S. Green, Esquire, wrote Judge Balick advising her of this view. The record is clear that by that date, even if Mr. Kohn was not aware of my February 23, 1978 letter to Mr. Unger, specifically mentioning the association of John Elzufon, Esquire, with F. Alton Tybout, Esquire, he knew or should have known of that association.

10. On January 30, 1980, I called Mr. Kohn and advised him of the existence of my letter to Mr. Unger of February 23, 1978, particularly the reference to Mr. Elzufon's association with Mr. Tybout. Mr. Kohn stated that he knew nothing about it but would look into the matter. I also told him that on January

30, 1980, I had written to Mr. Unger, who was then out of town, referring him to my February 23, 1978 letter and urged that the matter be carefully re-examined.

11. Yesterday, January 31, 1980, Mr. Kohn phoned me and indicated that he had been able to reach Mr. Unger who confirmed that he recalled my letter of February 23, 1978, including the specific reference to Mr. Elzufon's association with Mr. Tybout. Mr. Kohn related that Mr. Unger had asked him to relate that fact to the court, and thus correct any erroneous statement concerning Mr. Unger's knowledge of Mr. Elzufon's association with Mr. Tybout at the next proceeding before the court scheduled for Monday, February 4, 1980. However, Mr. Kohn advised me that Mr. Unger instructed him to proceed with the motion to disqualify Mr. Tybout.

12. I have now advised the court, Mr. Tybout, Mr. Kohn and Mr. Unger, either orally or by letter, that I cannot join in the pending motion to disqualify Mr. Tybout. Since I am advised that the motion will be pursued without my consent, I have no alternative but to ask the court to permit me to withdraw as counsel for Unit, Inc. in these proceedings.

A. G. T. Moore II
Andrew G. T. Moore, II

SWORN TO AND SUBSCRIBED before me a notary public, this 1st day of February, 1980.

Sandra J. McCracken
Notary Public

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON, DELAWARE, LTD., a Texas limited partnership, Debtor-In-Possession under Chapter XII of the Bankruptcy Act of the United States, and UNIT, INC., a Texas corporation Debtor-In-Possession Under Chapter XI of the Bankruptcy Act of the United States,

Plaintiffs,

v. : Civil Action No. 76-149

THE FARMERS BANK OF THE STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF F. ALTON TYBOUT

STATE OF DELAWARE:
: SS.
NEW CASTLE COUNTY:

I, F. ALTON TYBOUT, being duly sworn, do depose and say:

(1) I am the senior member of a legal professional association currently known as Tybout, Redfearn, Casarino & Pell, P.A. and, before November 1, 1979, known as Tybout & Redfearn, P.A. On December 6, 1976, John A. Elzufon, Esquire, was employed as an attorney in this office and has continued an employee to this date.

(2) At some point in the summer of 1978, Peter J. Walsh, Esquire, as Trustee for Freidco of Wilmington, Delaware, Ltd., asked me whether I would be willing to act as attorney for the Trustee and I stated that I would. Later in the summer, during August, I had a number of conferences with the Trustee about the case and took possession of a number of copies of pleadings and documents and removed them to my office.

Shortly thereafter, in late August or September of 1978, Mr. Elzufon chanced to see some of the papers and mentioned to me that he had been involved as a junior associate with Andrew G. T. Moore, II, Esquire, and Daniel M. Kristol, Esquire, all of Killoran and VanBrunt, as attorney for Freidco of Wilmington, Delaware, Ltd. and Unit in certain respects, principally in preparing the brief on behalf of Unit and Freidco in resisting the appointment of the Trustee. He told me that he did not have a clear recollection of what he had done with the exception of working on the brief but that he had had a minimum amount of direct contact with Mr. Morris, the principal in Unit, except that he had attended a deposition in which Mr. B. W. Morris had taken the position that he was not required to answer questions because of the fifth amendment protection. He was clear that in the course of the deposition he was not the principal attorney but was simply attending it as an assistant to Mr. Moore or Mr. Kristol.

(3) Within a few hours of my brief discussion with Mr. Elzufon as related in paragraph (2), I called Mr. Moore and stated my opinion that, although Mr. Elzufon would have nothing to do with the entire matter if I continued to represent the Trustee, nevertheless, I felt it was important to learn Mr. Moore's position on behalf of Unit about whether he felt there was a conflict of interest that would make it improper for me to represent the Trustee. Mr. Moore stated, in effect, that he had been and was then aware of Mr. Elzufon's presence in my office but that he did not feel that there was any occasion under the circumstances to object to my representation of the Trustee. I had been at all times aware that Mr. Moore and Mr. Elzufon had been associated with the same law office, Killoran and VanBrunt, and were well acquainted and on a friendly basis. I had known that Mr. Moore was aware that Mr. Elzufon was a member of this office well before the Trustee's

petition and I assumed that he must have considered that fact when the petition was presented to the Court. Consequently, I was not surprised that he took the position that he did. I did not, therefore, give the matter of a possible conflict of interest any further thought nor discuss the matter further with Mr. Elzufon until it was raised for the first time in the conference before the Court on January 17, 1980.

(4) As part of the ongoing discovery in preparation for the hearings, I scheduled and took the deposition of Mr. B. W. Morris on January 16, 1980. On the day-long deposition, in the morning either at the outset of during the mid-morning break, Mr. Elzufon, who chanced to be walking in the hallway of the office went to Mr. Morris and spoke to him briefly. I saw this occur but was not privy to the conversation. Throughout the balance of the deposition in the morning and during the afternoon deposition neither Mr. Morris nor his attorney, Mr. Unger, who was present during the entire deposition, raised any question about this office representing the Trustee. After the deposition I asked Mr. Elzufon what he and Mr. Morris had discussed and he told me that he had simply said "hello" to him and reminded him of their former meeting a number of years ago.

(5) Over the course of my representation of the Trustee, no other attorney in the office, including Mr. Elzufon, has had occasion to work on the file. Mr. Elzufon and I have not discussed the case at all in any way except for an occasional casual inquiry on his part about the general progress of the litigation.

(6) On January 17, 1980, after the conflict of interest issue was raised by Unit's attorney in the course of the meeting before the Court, I spoke by telephone with Mr. Moore. I inquired of him whether he recalled the telephone

conversation referred to in paragraph (3) above, and he stated that he did not. However, he stated that he had been aware at the time of the Trustee's application for my appointment as attorney for Trustee that Mr. Elzufon was an associate in my office and that he did not consider that fact to constitute a conflict of interest which would warrant objecting to the appointment. He further stated that Sherman Unger, co-counsel for Unit was present at the time of the application and that he, Mr. Moore, was confident that Mr. Unger was aware also at that time of Mr. Elzufon's association with my office. He stated that the motion to disqualify had been made without his knowledge or agreement.

(7) After the disqualification matter was raised, I spoke further to Mr. Elzufon about the extent of his prior activities in the course of Killoran and VanBrunt's representation of Freidco or Unit. Mr. Elzufon informed me that he assisted Daniel Kristol, Esquire, of Killoran and VanBrunt in litigation involving a claim by a realtor, Patterson-Schwartz, against Unit, tried without a jury before The Honorable Walter K. Stapleton. He was uncertain in his recollection about what issues were involved in the trial, but he does recall that it had nothing to do with Freidco and that he had no occasion to communicate with Mr. Morris or to consider any issue involving Freidco. He informed me that a second occasion to consider Unit's interest occurred after the filing of the litigation by Robert E. Hickman and Harry B. Tingle against Unit, Inc. and Freidco of Wilmington, Delaware, Ltd., in the Delaware Court of Chancery. He was a junior member of the office working on the litigation with Mr. Moore and Mr. Kristol. It was in connection with this case that the deposition took place in which Mr. Morris took the position that he was not required to answer certain

questions because of fifth amendment protection. He believes that he was in attendance at a conference involving Mr. Kristol and Mr. Morris preceding that deposition although he recalled no details of it. He stated that he might have assisted in the preparation of the third party complaint against Farmers in the Chancery litigation but is not certain. His actions in the Chancery litigation took place within approximately the first one and a half years after his admission to the Bar. He reiterated that in the bankruptcy proceeding he prepared the brief on behalf of Unit and Freidco resisting the appointment of the Trustee. During the hearing he did legal research as directed by the senior attorneys. He also recalls working on a brief in an action filed by either Unit or Freidco against Farmers Bank in the Federal Court which alleged certain violations of the Bank Holding Company Act. He further informed me that in the course of these cases he probably did other less memorable chores but has no specific recollection of them.

F. Alton Tybout
F. ALTON TYBOUT

SWORN TO AND SUBSCRIBED before me a notary public, this 6th day of February, 1980.

NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON, :
DELAWARE, LTD., a Texas
limited partnership, Debtor- :
In-Possession under Chapter
XII of the Bankruptcy Act :
of the United States, and
UNIT, INC., a Texas corpora- :
tion Debtor-In-Possession
Under Chapter XI of the :
Bankruptcy Act of the United
States, :

Plaintiffs, :

v. : Civil Action No. 76-149

THE FARMERS BANK OF THE :
STATE OF DELAWARE,

Defendant. :

AFFIDAVIT OF JOHN A. ELZUFON

STATE OF DELAWARE:
: SS.
NEW CASTLE COUNTY:

I, JOHN A. ELZUFON, being duly sworn, do depose and say:

(1) I have reviewed the affidavit of F. Alton Tybout dated 6th day of February, 1980, and insofar as it relates actions taken by me or representations made by me to him, the affidavit is correct in stating that I took those actions and made those representations and the representations which I made as stated in that affidavit are correct.

JOHN A. ELZUFON

SWORN TO AND SUBSCRIBED before me a notary public, this 6th day of Feb, 1980.

NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON, DELAWARE, LTD., a Texas limited partnership, Debtor-In-Possession under Chapter XII of the Bankruptcy Act of the United States, and UNIT, INC., a Texas corporation Debtor-In-Possession under Chapter XI of the Bankruptcy Act of the United States,

Plaintiffs,

v.

THE FARMERS BANK OF THE STATE OF DELAWARE,

Defendant.

Civil Action No. 76-149

AFFIDAVIT OF PETER J. WALSH

STATE OF DELAWARE)
) SS:
NEW CASTLE COUNTY)

I, PETER J. WALSH, being duly sworn do depose and say:

1. I am Trustee in bankruptcy of Freidco of Wilmington, Delaware, Ltd. ("Freidco"), BK #76-49, by an appointment made by the Bankruptcy Court on June 30, 1977. I am a member of the firm of Murdoch & Walsh, P.A. and by an order of the Bankruptcy Court dated July 8, 1977 was appointed as counsel for the Trustee.

2. Sometime during the summer of 1978, after having undertaken substantial work as Trustee and as counsel for the Trustee in connection with the bankruptcy proceedings and various ancillary proceedings in other

FILED

courts, I determined that the assistance of additional trial counsel would aid in the resolution of the issues in litigation and in concluding the bankruptcy proceedings.

3. In July 1978 I advised the Bankruptcy Judge Helen S. Balick that I proposed to file an application to retain trial counsel to assist me in the proceeding. I advised Judge Balick at that time that I had drawn up a list of four or five attorneys, one of whose services I would attempt to obtain in this regard. Because of the multifarious aspects of the Freidco bankruptcy and since the bankruptcy proceeding had been going on for almost two years before my involvement, I checked these names with Judge Balick because I wanted a preliminary screening on any possible conflict of interest.

4. After advising Judge Balick of those names, I contacted one attorney on the list and after some discussion, we concluded that he had a conflict of interest. I then contacted Mr. Tybout by telephone and briefly outlined to him the nature of the proceedings and the parties involved. A day or two later I had a conference with Mr. Tybout and explored with him in more detail the parties involved to make sure that there were no conflict of interest. At that time Mr. Tybout advised me that at one time he had been briefly consulted by H. Whitwell Wales, an officer of the Farmers Bank, in connection with a matter related to these proceedings. Mr. Tybout subsequently conferred in writing with the Farmers Bank and with Mr. Wales regarding this possible conflict and both the Farmers Bank and Mr. Wales advised Mr. Tybout that they had no objection to his involvement in the case as counsel for the Trustee.

5. When I became involved in the case in the summer of 1977, I had occasion to review pleadings prepared by various parties, including pleadings prepared by Unit, Inc. and Freidco's counsel, Killoran and Van Brunt. Most of those pleadings were filed by either Andrew G. T. Moore, II or Daniel M. Kristol of that firm and I became quite familiar with Messrs. Moore and Kristol's involvement in the case. I have known Messrs. Moore & Kristol and of their association with the firm of Killoran and Van Brunt for many years. A number of months subsequent to the Bankruptcy Court's order authorizing the hiring of Mr. Tybout, I had occasion to telephone Mr. Moore to ask him about a procedural aspect of the case which occurred prior to my involvement. Mr. Moore at that time suggested that I might seek clarification on that question by consulting with John A. Elzufon then associated and now associated with Mr. Tybout's firm and who had been associated with Mr. Moore in the Killoran and Van Brunt firm and who had worked on several aspects of the case.

6. When I requested that Mr. Tybout act as trial counsel for the Trustee, I was not aware that Mr. Elzufon was an associate in Mr. Tybout's firm. I was not aware that Mr. Elzufon was formerly an associate in the firm of Killoran and Van Brunt. In fact, I never met or spoke with John A. Elzufon until he spoke with me for the first time about this case on the occasion of the deposition of Mr. Morris on January 16, 1980.

7. Thus, Trustee's application in August10 , 1978 requesting Bankruptcy Court approval of the appointment of Mr. Tybout as trial counsel for the Trustee was made without

any knowledge on my part regarding either the identity of Mr. Elzufon or the fact that he was at that time an associate in Mr. Tybout's firm and was a former associate in the firm of Killoran and Van Brunt and associated with Messrs. Moore and Kristol in the Freidco bankruptcy proceeding.

PETER J. WALSH

SWORN TO AND SUBSCRIBED before me this 6th day of February, 1980.

Robert L. Thomas
NOTARY PUBLIC

AFFIDAVIT OF MAILING

STATE OF DELAWARE)
)   SS:
NEW CASTLE COUNTY)

BE IT REMEMBERED, That on this 6th day of February A.D. 19X 80, personally appeared before me, the Subscriber, a Notary Public for the County and State aforesaid, Vivian Walls, who, being duly sworn according to law, did depose and say that she personally mailed a true and correct copy of the annexed Affidavit of Peter J. Walsh

to Sherman E. Unger, Esquire, 2704 DuBois Tower, 511 Walnut Street, Cincinnati, OH 45202

by United States Mail, Postage Prepaid.

Vivian Walls

AFFIRMED AND SUBSCRIBED before me the day and year aforesaid

Notary Public

cc: F. Alton Tybout, Esquire
Max S. Bell, Jr., Esquire
Sherman Unger, Esquire
Andrew G. T. Moore, II, Esquire
Thomas Hughes, Esquire

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE
WILMINGTON 19801

WM. S. ANDERSON, JR.
CLERK

February 8, 1980

Sherman E. Unger, Esquire
Michael G. Kohn, Esquire
2820 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Max S. Bell, Jr., Esquire
Robert J. Katzenstein, Esquire
Richards, Layton & Finger
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Peter J. Walsh, Esquire
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Tybout, Redfearn, Casarino & Pell
P. O. Box 2092
Wilmington, DE 19899

Thomas G. Hughes, Esquire
O'Donnell & Hughes
P. O. Box 2214
Wilmington, DE 19899

Re: Freidco of Wilmington, Delaware et al vs.
The Farmers Bank of the State of Delaware
Civil Action No. 76-149

Gentlemen:

Enclosed is the Findings of Fact and Conclusions of Law and an Order signed by the Honorable Walter K. Stapleton and filed this date in the above action.

Very truly yours,

William S. Anderson, Jr.
Clerk

By: ____________
Deputy Clerk

eo'c

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON, DELAWARE, :
LTD., a Texas limited partner- :
ship Debtor-In-Possession under :
Chapter XII of the Bankruptcy :
Act of the United States, and :
UNIT, INC., a Texas corporation, :
Debtor-In-Possession under :
Chapter XI of the Bankruptcy :
Act of the United States, :
:
Plaintiffs, : Civil Action No. 76-149
:
v. :
:
THE FARMERS BANK OF THE :
STATE OF DELAWARE, :
:
Defendant. :

Sherman E. Unger, Esquire, and Michael G. Kohn, Esquire, Cincinnati, Ohio, Attorneys for Plaintiff Unit

Max S. Bell, Jr., Esquire, and Robert J. Katzenstein, Esquire, of Richards, Layton and Finger, Wilmington, Delaware, Attorneys for Defendant Farmers

Peter J. Walsh, Esquire, of Murdoch and Walsh, Wilmington, Delaware, Trustee and Attorney for Trustee of Freidco

F. Alton Tybout, Esquire, of Tybout, Redfearn, Casarino & Pell, Wilmington, Delaware, Attorney for Trustee of Freidco

Thomas G. Hughes, Esquire, of O'Donnell
and Hughes, Wilmington, Delaware,
Attorney for FDIC

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Wilmington, Delaware

February 8, 1980

STAPLETON, District Judge:

FINDINGS OF FACT

1. This is a factually complex case involving a multitude of claims among three parties: Farmers Bank of the State of Delaware, Freidco of Wilmington, Delaware, Ltd., a limited partnership currently in a Chapter XII bankruptcy proceeding, and Unit, Inc., a Texas corporation, currently in a Chapter XI bankruptcy proceeding. The original complaint was filed on April 23, 1976 and, accordingly, the matter is of considerable vintage.

2. Prior to August 31, 1976, Unit, Inc. was represented in a number of matters by the Wilmington, Delaware law firm of Killoran & Van Brunt. The partners of the firm having responsibility for these matters were Andrew G. T. Moore, II, Esquire, and Daniel M. Kristol, Esquire. They were assisted in handling some of these matters, however, by a junior associate named John A. Elzufon. Two of the matters upon which he worked, a case in the Court of Chancery and Unit's opposition to the appointment of a trustee in bankruptcy for Freidco, involved subject matter similar to that involved in some of the claims in the instant action. Elzufon's primary responsibility with respect to these matters was the research of legal questions identified by either Moore or Kristol. Unit was also represented in these matters by Sherman E. Unger, Esquire, of Cincinnati, Ohio.

3. The firm of Killoran & Van Brunt dissolved on August 31, 1976. Moore thereafter became a partner in the firm of Connolly, Bove & Lodge and continued to represent Unit. Elzufon became an associate with the firm of Tybout & Redfearn, P.A.

4. On June 30, 1977, Peter J. Walsh, Esquire, of the firm of Murdoch & Walsh, P.A. was appointed trustee

in bankruptcy of Freidco. On July 8, 1977, he was appointed counsel for the trustee.

5. During the early summer of 1978, after having undertaken substantial work as trustee and as counsel for the trustee in connection with the bankruptcy proceeding and various ancillary proceedings in other courts, Walsh determined that the assistance of an additional trial counsel would aid in the expeditious resolution of the issues of litigation and concluding the bankruptcy proceedings. After preliminary discussions with Bankruptcy Judge Helen S. Balick, Walsh contacted F. Alton Tybout, Esquire to inquire whether he would be willing and able to assist in the representation of Freidco in this litgation. He indicated that, if the representation were undertaken, any support work necessary to Mr. Tybout's litigating efforts would be supplied by Murdoch & Walsh, P.A. Walsh and Tybout reviewed the parties involved and considered possible conflicts of interest. At that time, however, Walsh was unaware that Elzufon was an associate of Tybout's firm and Tybout was unaware of Killoran & Van Brunt's prior representation of Unit. Tybout agreed to undertake the representation if approved by Judge Balick.

6. On August 10, 1978 Walsh, as trustee, applied to Judge Balick for authorization to engage Tybout's services. When Moore received notice that the trustee was proposing to engage the services of Tybout he was aware of Elzufon's prior work for Unit and of his current association with Tybout's firm. In a previous letter dated February 23, 1978 Moore had had occasion to advise Unger, Unit's lead counsel, of the fact of Elzufon's involvement with Unit's affairs and of his move to the Tybout firm. After receiving notice of the proposed engagement Moore discussed with Unger what position Unit should take with respect to the trustee's

application. During this discussion, Moore specifically reminded Unger that Tybout was the same lawyer referred to in his earlier letter and that Elzufon was associated with Tybout.

7. At a hearing on the trustee's application before Judge Balick on August 15, 1978, Moore, in the presence of Unger, advised the Court that Unit supported the application of the trustee to retain Tybout.

8. In late August or September, 1978, Elzufon noticed papers bearing the caption of this case in the Tybout office and advised Tybout that he had worked on matters for Unit while at Killoran & Van Brunt.

9. Within a few hours of discussion with Elzufon, Tybout called Moore. He discussed the matter with Moore, explaining his understanding with Walsh that there would be no occasion for anyone in the Tybout office to work on Unit matters and stating that he if continued to represent the trustee Elzufon would have no contact whatever with the entire matter. Tybout indicated, however, that he wanted to know whether Unit objected to his representing the trustee. Moore indicated that he had been aware of Elzufon's presence in the Tybout office but that under the circumstances he saw no reason to object to Tybout's representation of the trustee.

10. Neither Elzufon nor anyone else in the Tybout firm, other than Tybout, has worked on the Freidco matter since the firm undertook this representation. Elzufon has not communicated to Tybout any information concerning any subject matter involved in this lawsuit. In the approximately eighteen months since undertaking the representation, Tybout has invested in excess of 300 hours in this matter.

11. The Court and the trustee have been pressing for sometime to get this matter to trial. On December 4, 1979, the Court set the matter for trial commencing January 14, 1980. As a result of events not here relevant, that date had to be abandoned. On December 28, 1979, however, the Court set the case for two weeks of trial commencing February 11, 1980, one week of trial commencing April 14, 1980, and two weeks of trial commencing August 4, 1980, with various specified issues to be tried at the various stages.

12. On January 17, 1980, the Court was advised that Unit intended to file a motion to disqualify Tybout as counsel for the trustee. Such a motion was served on the other parties on January 21, 1980. The motion was accompanied by an affidavit of the chief executive officer of Unit, Inc. which states that he was unaware of Elzufon's association with Tybout prior to January 16, 1980. The motion is also accompanied by an affidavit of Unger in which he states that he was unaware of Elzufon's association with the Tybout firm "at the time of the appointment of Mr. Tybout as special trial counsel for the trustee."

13. Affidavits have been filed in connection with the issues raised by the motion to disqualify and the parties have been heard thereon. At the hearing, Michael G. Kohn, Esquire, an associate of Unger, reported that he had been in touch with Unger to discuss the content of affidavits submitted in opposition to the motion to disqualify. Kohn represented to the Court, on Unger's behalf, that while Unger has no present recollection of having been advised of the relevant facts prior to Tybout's appointment, he has no reason to disbelieve and, therefore, does not contest, Moore's representations concerning the letter of February 23, 1978 and the discussion regarding the trustee's application to retain

Tybout. No party has requested an evidentiary hearing and I perceive no material dispute of fact raised in the affidavits. Specifically, Unit does not maintain Elzufon has breached his duty under Canon 4 to refrain from disclosing confidential information received from a former client. It does, however, assert that Tybout's representation of Freidco creates the appearance of impropriety.

14. While Elzufon has no present recollection of factual information received in the course of the prior representation, it is likely that he was exposed to confidential information of Unit, Inc. while associated with Killoran & Van Brunt.

15. On the other hand, Elzufon has been isolated from the Freidco representation by Tybout since its inception. There has been no communication between Tybout and Elzufon concerning information obtained in the earlier representation and given the manner in which the Freidco matter is being handled by Murdoch & Walsh, P.A. and Tybout, there is no reason to believe there will be any such communication in the future.

16. Given the distribution of litigation responsibility between Walsh and Tybout and the Court's schedule, it is reasonable to expect that disqualification of Tybout at this point would delay the commencement of trial by at least six months. Such a delay would not appear to be in the interest of the participants in either the Freidco or Unit bankruptcy proceedings.

CONCLUSIONS OF LAW

1. Some of the subject matter of Elzufon's representation of Unit is substantially related to the

subject matter of Tybout's representation of the Freidco trustee.

2. In this Circuit, the "mode of analysis" employed in determining attorney disqualification controversies involves "a careful sifting of all of the facts and circumstances." Akerly v. Red Barn Systems, Inc., 551 F.2d 539, 543 (3d Cir. 1977). In a case of this character, this careful sifting is to be focused, among other things, on determining the likelihood that information obtained in the previous representation and relevant to the subject matter of the litigation in which disqualification is claimed may be used against the former client. Akerly v. Red Barn Systems, supra. While I have assessed the likelihood of that occurring in this case to be nil, I would nonetheless be reluctant to deny the motion for disqualification were it not for the consent of the former client and the prejudice and disruption caused by the tardiness of the motion. This reluctance would be occasioned primarily by the appearance of impropriety from the point of view of the former client, and the lack of concrete assurance to Unit that its confidence would be preserved. The evidence of consent and of inordinant delay is of crucial significance here, however.

3. In considering the consent aspects of this matter, it is important to note that the question presented is not one of whether a client can irrevocably consent to his former laywer's representation of adverse interests in litigation involving the same subject matter as the prior representation — i.e., whether a former client can irrevocably consent to the use of confidential information on behalf of another. See Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978). This issue would be presented only if Tybout himself had been exposed to confidential

information in a prior representation of Unit. Rather, the issue presented in this case is whether a former client, fully apprised of all relevant facts, can consent to an arrangement which is designed to isolate a lawyer who previously represented him from another lawyer who wishes to represent (and whom the former client wishes to represent) an opposing party and whether the former client can withdraw that consent after the other party and its lawyers have relied to a substantial degree upon that consent.

4. I believe the answer to the consent issue posed by this case requires that the motion be denied. Unit, by supporting the trustee's application to engage Tybout, by advising Tybout thereafter that it saw no problem with his arrangement with the trustee and Murdoch & Walsh, and by failing to raise the disqualification issue for over eighteen months while the trustee and Tybout relied on the consent and acquiescence, has foreclosed itself from disqualifying Freidco's attorney.* Cf. In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976); City of Cleveland Elec. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1976) aff'd. 573 F.2d 1310 (6th Cir. 1977); Koerhing Co. v. Manitowoc Co., Inc., 418 F. Supp. 1133 (E.D. Wis. 1976); ABA Committee on Ethics & Professional Responsibility, Informal Op. 1323 (April 21, 1975).

5. Canon 9 of the Code of Professional Responsibility teaches that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." While this canon should be strictly applied in order to maintain public confidence in the integrity of the Bar, "it is not intended completely to override the delicate balance created by Canon 4. . ." Silver Chrysler

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* At all times here relevant, Unger and Morris had at least apparent authority to represent the position of Unit with respect to matters pertaining to this litigation.

Plymouth, Inc. v. Chrysler Mot. Corp., 518 F.2d 751, 757 (2nd Cir. 1975). The Seventh Circuit has noted that

> "[A]n attorney should be disqualified under Canon 9 only when 'there is a reasonable possibility of improper professional conduct' and 'the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case.'"

Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir.), cert. denied, 439 U.S. 955 (1978). See also, Brennan's Inc. v. Brennan's Restaurant, Inc., 592 F.2d 168 (5th Cir. 1979); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978).

I conclude that in a case where the attorney involved in the prior representation is not involved in the subsequent one and where the former client knowingly consented to the representation of his adversary by the attorney as to whom he now claims disqualification, the likelihood of injury to the profession in the eyes of the public is sufficiently remote that it should not override the interests of the party who has relied on the express consent of the former client and the interests of the Court and the public in the prompt resolution of this dispute.

6. Wholly apart from the consent aspect of this case, however, I believe that Unit's delay until the eve of trial in raising the disqualification matter is itself a sufficient ground for denying its motion. Redd v. Shell Oil Co., 518 F.2d 311 (10th Cir. 1975).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON, DELAWARE, LTD., a Texas limited partnership Debtor-In-Possession under Chapter XII of the Bankruptcy Act of the United States, and UNIT, INC., a Texas corporation, Debtor-In-Possession under Chapter XI of the Bankruptcy Act of the United States,

Plaintiffs,

v.

THE FARMERS BANK OF THE STATE OF DELAWARE,

Defendant.

Civil Action No. 76-149

ORDER

THIS 8th day of February, 1980, for the reasons stated in the Court's Findings of Fact and Conclusions of Law filed today,

Now, therefore, IT IS ORDERED that Unit, Inc.'s motion to disqualify F. Alton Tybout, Esquire is denied.

FILED
FEB 8 12 08 PM '80
CLERK, U.S. DISTRICT COURT
DISTRICT OF DELAWARE

United States District Judge

Justice MOORE. On January 30, 1980, I wrote Mr. Unger, and I said, "Dear Sherman, I returned to the office earlier this week than I expected and have now had an opportunity to review the motion to disqualify Alton Tybout, its supporting affidavits and legal memorandum. It is an understatement to say that I am surprised at their content. Under no circumstances would I unilaterally 'approve' the appointment of Alton Tybout without prior consultation with you, and I recall that we discussed Peter Walsh's application"—Peter Walsh was the trustee—"seeking Alton's appointment in considerable detail. You may also recall that you and I attended the hearing before Judge Balick when the application to hire Mr. Tybout was presented. At that time, you and I represented to the court that we had no objection to Alton's appointment, which was approved by the court on August 15, 1978," and I have the transcript of that hearing, dated August 15, 1978, showing the presence of Mr. Unger and his associate, Mr. Kohn, and at page 3, the court turned to me and he said, "Mr. Moore?"

I said, "We have—we don't have any objection to the proposal, Your Honor," which was to hire Mr. Tybout.

And again, the court called on me to respond to whether Mr. Tybout should be retained solely for one or two individual cases, or on a general retainer——

Senator SPECTER. Justice Moore, without going into that issue any further, are you suggesting that there is something improper about what Mr. Unger did here?

Justice MOORE. He filed an affidavit which he never withdrew or corrected, despite the fact that I called it to his attention. And I also called to his attention in my letter the fact that I had earlier written to him, and this is what my letter says——

Senator SPECTER. So, your conclusion or contention is that Mr. Unger filed a false affidavit?

Justice MOORE. Yes, sir. And when I asked that the affidavit be corrected or withdrawn, that did not happen. I eventually filed an affidavit with the court, accompanying my motion to withdraw, and Mr. Unger apparently was out of the country or out-of-town, and I spoke with Mr. Kohn, and Mr. Kohn initially indicated that he had spoken with Mr. Unger, and this is what my affidavit said: "Yesterday, on January 31, Mr. Kohn phoned me and said he had been able to reach Mr. Unger, who confirmed that he recalled my letter of February 23, 1978, including the specific reference to Mr. Elzufon's association with Mr. Tybout. Mr. Kohn related that Mr. Unger had asked him to relate that fact to the court and thus correct any erroneous statement concerning Mr. Unger's knowledge of Mr. Elzufon's association with Mr. Tybout at the next proceeding before the court, scheduled for Monday, February 4. However, Mr. Kohn advised me that Mr. Unger instructed him to proceed with the motion to disqualify Mr. Tybout," which of course, surprised me, because the whole underpinning was this affidavit that nobody knew anything about Mr. Elzufon's relationship.

However, on the morning of the hearing, Mr. Kohn came to my office before the hearing, and he said that he was not going to correct the affidavit but merely, after speaking to Mr. Unger further, was going to say that he would not dispute my affidavit although he, Mr. Unger, had no recollection now whatsoever of my February letter.

And as a matter of fact, Judge Stapleton's findings of fact and conclusions indicate that that is precisely what Mr. Kohn told the court.

The affidavit was never withdrawn; the motion was indeed prosecuted. I withdrew from the case. The motion, of course, was denied. And until today, when I spoke with Mr. Unger right here in this room, I had never had another conversation with him.

Senator SPECTER. Justice Moore, the transaction that you describe is complicated. Could you summarize that you consider to be the false aspect of the affidavit which Mr. Unger filed?

Justice MOORE. Well, I believe first of all, Senator, as the court recognized, this motion, I think, was filed strictly for tactical reasons. There was a trial about to take place and Mr. Tybout was going to be very active in it, and he had been pressing some claims against Unit, and it would have been tactically very adviseable to see if he could be disqualified. And the only basis upon which he could be disqualified was if it could be shown that there was a young associate in his firm who had once worked for a firm of mine. And that was clearly wrong. Mr. Unger knew it. I do not know that Mr. Kohn knew it specifically at the time.

Senator SPECTER. How do you know that Mr. Unger knew it?

Justice MOORE. Well, Senator, because of my letter—again, I will refer back to my letter to Mr. Unger of January 30.

Senator SPECTER. And in that letter, you specify that the attorney in question had never been employed by your firm?

Justice MOORE. No. he was employed by my firm, and this is what I wrote, to remind Mr. Unger that he well knew that fact, and had known it for months—and this is what I——

Senator SPECTER. Did Mr. Unger allege that he had not known that, that the attorney had been employed in your firm?

Justice MOORE. he alleged it, yes—well, no, I am sorry—he alleged that he did not know that the young lawyer worked for Mr. Tybout. He knew that he had worked for my firm. But he claimed that until sometime in mid- to early January of 1980, he never knew that Mr. Elzufon, the young associate, now worked for Mr. Tybout. But in fact, as my letter to Mr. Unger of January 30 stated:

> In fact, months before Alton was appointed, I advised you that John Elzufon was in Alton Tybout's firm. You undoubtedly have forgotten my letter to you of February 23, 1978, wherein I stated on page 8: "One of the finest and most successful tort lawyers in this State is Alton Tybout. John Elzufon is now an associate of that firm".

[Whereupon, Senator Hatch assumed the Chair.]

Senator HATCH. Which letter is this, Justice Moore?

Justice MOORE. Senator Hatch, this is a letter from me to Mr. Unger, dated January 30, 1980, reminding him of a letter I had written to him on February 23, 1978, which was——

Senator HATCH. Without objection, we will enter the letter in the record.

Senator SPECTER. We have put them all in already.

Senator HATCH. Fine.

Senator METZENBAUM. May I just——

Senator SPECTER. Let me finish up, please, if I may.

Justice Moore, as to the specifics on the items which you say Mr. Unger knew to be false, beyond what is contained in the documents, did you have a conversation with Mr. Unger directly about them?

Justice MOORE. No, sir, I never did. Mr. Unger never called me, never once tried to set the record straight with me, and until today, when he discussed it with me during one of the recesses.

Senator SPECTER. And you concluded that the correspondence was sufficient, and you would not take any further initiative in discussing it with Mr. Unger?

Justice MOORE. Senator, at that point, I had withdrawn. I felt I had been very badly used.

Senator SPECTER. Did the court ever make any inquiries or take any action on the underlying issues which you submit to show the false affidavit filed by Mr. Unger?

Justice MOORE. No, sir, other than to make findings of fact which indicated that he recognized that Mr. Unger's affidavit was incorrect.

Senator SPECTER. Do you have copies of the findings of fact?

Justice MOORE. Yes, sir, and they are part of the package that I have just given your staff member.

Senator SPECTER. They are part of the record, then. Does the judge make direct findings that Mr. Unger knew the facts to the contrary of those inserted in his affidavit?

Justice MOORE. Yes, sir. In fact, I will refer you to Judge Walter Stapleton's Findings of Fact and Conclusions of Law of February 8, 1980, and he says in finding 6:

> On August 10, 1980, Walsh, the trustee, applied to Judge Balick for authorization to engage Tybout's services. When Moore received notice that the trustee was proposing to engage the services of Tybout, he was aware of Elzufon's prior work for Unit and of his current association with Tybout's firm. In a previous letter dated February 23, 1978, Moore had had occasion to advise Unger, Unit's lead counsel, of the fact of Elzufon's involvement with Unit's affairs and of his move to the Tybout firm. After receiving notice of the proposed engagement, Moore discussed with Unger what position Unit should take with respect to the trustee's application. During this discussion, Moore specifically reminded Unger that Tybout was the same lawyer referred to in his earlier letter and that Elzufon was associated with Tybout.

Senator SPECTER. Justice Moore, did you or anyone else to your knowledge, take any action to have any sanction or prosecution for perjury initiated against Mr. Unger for that false affidavit?

Justice MOORE. No, sir, Senator, I did not. I was involved in extensive litigation in other matters and, frankly, I wanted to get out of the case because I just felt that I had been very, very badly used.

Senator SPECTER. I am not saying that you or anybody else should have, but I do think it is an appropriate inquiry as to whether anybody did take any such action.

Justice MOORE. No, sir. To my knowledge, no one took any criminal or disciplinary action against Mr. Unger.

Senator HATCH. You may proceed.

Senator METZENBAUM. Mr. Justice, let me see if I can summarize that particular matter, just to be sure I am clear about it.

Unger files an affidavit in support of a motion. He knows, or should know, that that affidavit is false, because you and he have talked about that very subject or the affidavit at an earlier point.

Justice MOORE. Absolutely, Senator.

Senator METZENBAUM. At some point in connection with the matter, there is a hearing in open court in which the entire matter is disclosed to Mr. Unger, that he is fully aware of the facts—when does that occur, before or after he files the affidavit?

Justice MOORE. There was a hearing in open court when Mr. Tybout was appointed.

Senator METZENBAUM. When Mr. Tybout was appointed, you at that time disclosed to Mr. Unger the fact that Mr. Tybout has working for him a young man who had formerly worked with you.

Justice MOORE. Oh, absolutely, because we wanted Mr. Tybout to be in the case, and Mr. Unger was in court with me and was urging me to acknowledge to the judge that we accepted Mr. Tybout.

Senator Metzenbaum. Mr. Unger is in court at that time?

Justice MOORE. Yes, sir.

Senator METZENBAUM. He files an affidavit, then, obviously knowing that that affidavit is false?

Justice MOORE. That was certainly my view, Senator, and that is why I withdrew from the case.

Senator METZENBAUM. Now, then, after that occurs, you send him a letter, and you point out to him the fact that his affidavit is false.

Justice MOORE. Yes, sir.

Senator METZENBAUM. He then refuses or fails to withdraw his affidavit——

Justice MOORE. That is correct.

Senator METZENBAUM [continuing]. Proceeds forward in the case; his associate, Mr. Kohn, relies upon the affidavit and says they are not going to withdraw it. The court makes a finding, and the finding is a denial of their motion, and refers specifically to the false affidavit.

Justice MOORE. Well, Senator, let me just back up. Mr. Kohn appeared. Mr. Unger did not appear at the hearing on the motion to disqualify. Mr. Kohn appeared, and his position was—which was contrary to what he had told me earlier and which appears in my affidavit supporting my motion to withdraw—but his position then was that Mr. Unger had no recollection at that stage of his prior communication with me, but that he would not dispute it. That is what they told the judge. They did not withdraw the affidavit, and the judge made the findings of——

Senator METZENBAUM. This was the case in which he said he had no recollection.

Justice MOORE. This is the case where he said he had no recollection, and the judge, of course, made the findings that indeed, he had been notified, and the judge pointed out that—this is what the judge found as to Mr. Kohn's representation to the court, and this is in finding 13 of Judge Stapleton's Findings of Fact and Conclusions of Law, on page 6 of his order:

> Kohn represented to the court on Unger's behalf that while Unger has no present recollection of having been advised of the relevant facts prior to Tybout's appoint-

ment, he has no reason to disbelieve, and therefore does not contest Moore's representations concerning the letter of February 23, 1978 and the discussion regarding the trustee's application to retain Tybout.

Now, I viewed that as being incredible, and I think the judge did, too, because he entirely based his ruling on the fact that there had indeed been consent to Mr. Tybout, and knowing consent, and he also pointed out in his conclusions 5 and 6 that he was in essence denying it as well because it appeared to be, for tactical reasons, on the eve of a trial.

Senator METZENBAUM. Justice, you have had two matters dealing with Mr. Unger, one of which you were aware of his ex parte efforts in connection with Judge Gartner, and you have already testified to that, and the other one of which you have just testified to, as to your withdrawing by reason of his filing a false affidavit in connection with a pending legal matter.

You are a Justice of the Supreme Court of Delaware.

Justice MOORE. Yes, sir.

Senator METZENBAUM. Do you have an opinion as to whether Mr. Unger has the moral integrity and the legal professionalism to qualify him to sit on the bench as a circuit court of appeals judge?

Justice MOORE. May I say something, just as——

Senator METZENBAUM. Anything you want.

Justice MOORE. Mr. Unger and I, I thought, were good friends, and I find him to be an utterly charming, delightful person to be with, both he and his wife, Nancy, who both my wife and I spent many happy times with. I think he is a very, very vigorous litigator, and I think some of the criticisms that have been raised against his litigation tactics are unfair.

But when it came to the situation involving this affidavit, Mr. Unger's failure to even communicate with me on the subject, and the failure to acknowledge to the court directly that that affidavit should have been withdrawn and that that spurious motion should not have been pursued, indicates to me a fatal flaw which, in my opinion, makes service on the judiciary a very difficult matter.

Senator METZENBAUM. I have no further questions, Mr. Chairman.

Senator HATCH. Justice Moore, do you have your complete letter file with you with regard to this matter?

Justice MOORE. Yes, sir, and it has been submitted to the committee.

Senator HATCH. Do you have a letter in your file dated February 23, 1978?

Justice MOORE. Yes, I do. Now, Senator, if I might back up, I have never previously released that letter to anybody. And as a matter of fact, one of the points that Mr. Kohn made to me in regard to my motion to withdraw was that the attorney-client privilege was being asserted as to that letter. I felt that that was an unfair assertion of the attorney-client privilege, and I cited, in my letter to Mr. Unger of January 30 the provisions of the Code of Professional Responsibility which I thought required me to disclose it. Nonetheless, I thought that the most important aspect of that letter was the reference to Mr. Unger's knowledge of the young associate.

For that reason, I have never disclosed it, because it related to a matter in which Mr. Unger's honesty and integrity was challenged by Mr. Paul Welch.

Senator HATCH. Is that letter part of the materials you have submitted?

Justice MOORE. No, sir, it is not, but I have the letter with me, and if Mr. Unger releases it, I certainly—he has once asserted the attorney-client privilege.

Senator HATCH. Mr. Unger.

Mr. UNGER. If there is any privilege, Mr. Chairman, I waive it and ask that it be made a part of the record.

Senator HATCH. You waive the privilege.

Then could you provide that letter, under those circumstances, Justice Moore?

Justice MOORE. Yes, sir.

Senator HATCH. Mr. Justice, we appreciate you taking the time to be here, and we appreciate having your testimony here today.

Justice MOORE. Senator, I want to thank the committee, and I appreciate the courtesy of the committee.

Senator HATCH. Well, thank you so much, and we wish you the best.

Justice MOORE. Thank you. May I be excused from my subpena?

Senator HATCH. You certainly may. But will you please leave that letter here with us?

Justice MOORE. Yes, sir, I will.

Senator METZENBAUM. You have a number of documents, I think, that you are going to leave; is that right?

Justice MOORE. Yes.

Mr. SHORT. They are being xeroxed.

Senator HATCH. Yes, you have all of them, but we must get this letter.

Justice MOORE. I have left with the committee every document in the file that I referred to during my testimony; the only additional document will be the August letter that Senator Hatch has requested.

Senator METZENBAUM. We appreciate your being here.

Senator HATCH. Thank you so much, Justice Moore.

[Aforementioned letter follows:]

ARTHUR G. CONNOLLY
JANUAR D. BOVE, JR.
NATHAN BAYALAN
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ALBERT F. BOWER
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RICHARD E. CORNWELL (D.C. BAR)
JAMES M. MULLIGAN, JR.
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REGINALD J. SUYAT (VA. BAR)

February 23, 1978 ✓

Sherman E. Unger, Esquire
2724 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Re: Libel And Malicious Prosecution Of Sherman E. Unger

Dear Sherman:

You have requested my legal advice with respect to the so-called "Debtor's Amendment To Its Statements And Schedules", signed by Paul P. Welsh, Esquire, on behalf of the firm of Morris, Nichols, Arsht & Tunnell, and by Harry B. Tingle as a purported "successor liquidating trustee" of Freidco. This document was personally served on us in the afternoon of Wednesday, February 22, 1978. I understand that you received a copy today by mail from Mr. Welsh at your offices in Cincinnati. The document has also been filed, as a public record, in the United States District Court for the District of Delaware.

My immediate impression of the document when I first read it, and my continued impression after thinking about it overnight, is that it is a highly unprofessional and irresponsible attempt by Mr. Welsh to achieve an end for his clients which is not justified by the facts in this case or the law. In this respect, I am divorcing consideration of the claims which Hickman and Tingle have made against Unit during the course of this proceeding and the right of their counsel to make fair comment thereon in his role as an advocate. However, the purported Amendment to the Debtor's Statement and Schedules now includes a direct attack upon Unit's counsel, and in my opinion, based on the facts known by me to date after full discovery by all parties on the issue on the appointment of a trustee, the allegations and statements signed under oath by Mr. Tingle, as prepared, drafted and signed by Paul Welsh exceed the bounds of fair comment and privilege. Specifically, I refer to the following, which appears under the heading "Supplement To Schedule B-2 Part Q":

> "The debtor has unliquidated claims against the following persons, of the following type and estimated amount:
>
> "(a) Claims against Unit, Inc. for embezzlement and conversion of the debtor's funds, for wrongful encumbrance of the debtor's property to secure its private obligations, for malicious and negligent mismanagement of debtor's affairs, including without limitation mismanagement of pro-

> ceedings conducted purportedly on debtor's behalf, for breach of fiduciary obligations, for conversion, and for fraud. The value of these claims has not been determined, but they are believed to exceed in value all of Unit's claimed interests in debtor and debtor's estate.
>
> "(b) Claims against Sherman E. Unger, Esquire, for inducing Unit's above described breaches of its obligations to debtor, for participation in all of Unit's said wrongs as a joint tort feaser, for malicious and negligent mismanagement of debtor's affairs, including without limitation mismanagement of proceedings conducted purportedly on debtor's behalf, for breach of fiduciary obligations, for conversion, and for fraud. The value of these claims has not been determined, but they are believed to exceed in value all of Mr. Unger's claimed interests in debtor and debtor's estate." (Emphasis added).

In essence, subparagraph (b) charges you with a knowing participation in a crime, or crimes, apparently for no other reason than your participation in this matter as counsel for Unit and secondarily, because of the fact that you too are a limited partner in Freidco.

If these allegations against you appeared without the benefit of knowing that Hickman, Tingle and Welsh attempted to include in the aborted settlement a requirement that you relinquish your limited partnership interest in Freidco, I would still consider the allegations beyond the protection of any privilege. However, knowing that Welsh negotiated directly with you in an effort to relinquish your participation in Freidco, it may be that these statements are not only unprivileged and libelous, but made for a malicious purpose and to achieve an end which is not warranted by any relief that Freidco or its other partners could rightfully seek against you for any breaches of alleged fiduciary obligations by Unit.

In the short time available to me since this document was served on us late yesterday, I have not had an opportunity to fully research the issues it may present insofar as your right to make a personal claim against Welsh, his law firm, or Harry Tingle. You should be aware that statements made in the course of judicial proceedings, bearing some relation to such proceedings, are ordinarily protected by an absolute privilege. Several cases seem to give lip service to this principle, although certain exceptions are recognized. Tatro v. Esham, Del.Super., 335 A.2d 623 (1975); Read v. Baker, 430 F.Supp. 472 (D.Del. 1977); Petty v. General Accident, Fire & Life Assurance Corp., 365 F.2d 419 (3d Cir. 1966), applying New Jersey law; Prosser, Torts, §109, p.798 (3d Ed. 1964); Restatement 2d, Torts, §586; Annotation, 38 A.L.R.3d 272.

Of course, Mr. Welsh's conduct is always subject to disciplinary action even in the face of an absolute privilege. Thus, if his allegations are false or the product of malice, he may be found guilty of Disciplinary Rule 7-102, which provides in pertinent part:

> "(A) In his representation of a client, a lawyer shall not:
>
> "(1) File a suit, assert a position, conduct a defense, delay a trial, or take

> other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
>
> "(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."
>
> * * *
>
> "(5) Knowingly make a false statement of law or fact."
>
> * * *
>
> "(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

It also would appear that if Mr. Welsh's statements are materially false, he has engaged in the type of misconduct prohibited by Disciplinary Rule 1-102:

> "(A) A lawyer shall not:
>
> "(1) Violate a Disciplinary Rule.
>
> "(2) Circumvent a Disciplinary Rule through actions of another."
>
> * * *
>
> "(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
>
> "(5) Engage in conduct that is prejudicial to the administration of justice."

Furthermore, if you believe that you have been libeled by Mr. Welsh, you, as a lawyer, are under an absolute obligation to report the same to the necessary authorities. See Disciplinary Rule 1-103.

If the actions of Messrs. Welsh and Tingle, as well as Morris, Nichols, Arsht & Tunnell are not absolutely previleged, it would appear that you may also have a valid claim for abuse of process. That cause of action was defined in the case of Unit, Inc. v. Kentucky Fried Chicken Corporation, Del.Super., 304 A.2d 320, 331 (1973):

> "In regard to the claim for abuse of process, Prosser states that the essential elements of the tort are: (1) an ulterior purpose; and (2) a wilful act in the use of the process not proper in the regular conduct of the proceedings. In explaining these elements, Prosser notes that some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required. Merely carrying out the process to its authorized conclusion, even though with bad intentions, does not result in liability. Some form of

> coercion to obtain a collateral advantage, not properly involved in the proceeding itself, must be shown. Prosser, Law of Torts, §121 (4th Ed. 1971)."

There may also be a claim for tortious interference with your business relations as a limited partner in Freidco. Again, the opinion in Unit, Inc. v. Kentucky Fried Chicken Corporation, supra is pertinent at p.332. The court stated:

> "The applicable law as to tortious interference with business relations was recently reviewed by Chancellor Duffy in Bowl-Mar Company v. Brunswick Corporation, Del.Ch.,297 A.2d 61 (1972). At 297 A.2d 64, the court cited the Restatement of Torts, §766 (1939) which states:
>
> > '. . .One who, without privilege to do so, induces or otherwise purposely causes a third person not to
> >
> > (a) Perform a contract with another, or
> >
> > (b) Enter into or continue a business relation with another
> >
> > Is liable to the other for the harm caused thereby.'
>
> "The court at 297 A.2d 65 also cited 45 Am.Jur.2d Interference, §50 to the following effect: 'The basic elements which establish a prima facie tortious interference with a business relationship are the exitence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy or the part of the interferer; and intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted.'"

However, even such tortious interference may be protected by an appropriate privilege. See the Restatement of Torts, §773 (1939) and Unit, Inc. v. Kentucky Fried Chicken, supra, pp.332, 333.

You also asked me about your amenability to service of process in Delaware. Ordinarily, one who comes into this State for purposes of attending court sessions has the privilege of immunity from process. Northumberland Insurance Co. v. Wolfson, Del.Supr., 251 A.2d 194 (1969). While the Northumberland case dealt with a witness, it seems to me that its rationale is equally applicable to a nonresident attorney who is appearing on behalf of a client.

Unless your previous application for counsel fees in the Freidco bankruptcy proceeding is construed as a general appearance, I do not see how you are subject to the jurisdiction of the Bankruptcy Court for the prosecution of any claim of the type set out in the purported Amendment to the Debtor's Schedules. There is one other aspect of this matter which bears some consideration. In the recent case of Sh-fer v. Heitner, ___U.S.___, 97 S.Ct. 2569 (1977), the United States Supreme Court invalidated the application of the Delaware Sequestration Statute to those nonresidents who do not have "minimun contacts" with Delaware. This would also be true with respect to our Foreign Attachment Statute. Prior to the Heitner decision, a person suing you could have attempted to bring you into this State by seizing your interests in the Freidco partnership. Even if that was attempted in this case by some alleged showing that you had certain minimum contacts with Delaware by virtue of your limited partnership interests in the Farmers Bank Building, it seems to me that a plaintiff would have to face some rather difficult technical questions, relating to those contacts, and secondly, whether the Delaware Sequestration or Foreign Attachment Statutes can be utilized to seize one's interest in a foreign partnership.

While I have tried to outline certain aspects of Delaware law to you, I think the issues are so important that you should consider consulting other counsel, particularly because of the possibility that I may have to be a witness in the event you file suit against Welsh, his firm and Harry Tingle. One of the finest and most successful tort lawyers in this State is Alton Tybout. John Elzufon is now an associate of his firm. He would be at the top of my list if you choose to consult other counsel with respect to this matter. Alton is a widely respected, very tough, and courageous lawyer in the tort field. You could do no better if you had him on your side. You might also consider talking to either Bill Prickett or Rod Ward at Prickett, Ward, Burt & Sanders, the firm that Danny Kristol joined. They also would be at the top of my list for this type of case.

I know you are considering a complaint to the Censor Committee of the Supreme Court of Delaware concerning Paul's conduct. Andy Kirkpatrick is the Chairman of that Committee, and would naturally withdraw from any consideration or participation in such an investigation. If you decide that a complaint should be made, and this is something that must be your personal decision, I would suggest that you write to Henry Herndon, Esquire, of the firm of Morris, James, Hitchens & Williams, P. O. Box 2306, Wilmington, Delaware 19899, one of the members of the Censor Committee. Any Committee member whose firms are associated with participants in the Freidco matter would naturally recuse themselves.

I know that you are very disturbed by what has transpired. Frankly, it is one of the most vicious things that I have ever seen take place during the course of a judicial proceeding, and I am utterly appalled. I can also assure you that Paul Welsh, as well as the conduct that you and I have observed, is in no way indicative of the standards that generally prevail at the Delaware bar.

Very truly yours,

Drew

Andrew G. T. Moore, II

AGTM/js

Senator HATCH. Mr. Unger, we are running out of time, and I do want to hear Mr. Van Dusen. But do you have any statement you would care to make with regard to Justice Moore's comments here?

Mr. UNGER. Yes, I do, Mr. Chairman, and I will try to make it very brief.

Senator HATCH. You may take back the Chair and make your statement on the record. You are still under oath.

Mr. Van Dusen, we will try to get to you. I realize that you have other commitments. Thank you for being patient.

Please proceed, Mr. Unger.

FURTHER TESTIMONY OF SHERMAN E. UNGER

Mr. UNGER. The affidavit filed by Justice Moore specifically says at paragraph 11:

> Yesterday, January 31, Mr. Kohn phoned me to indicate he had been able to reach Mr. Unger, who confirmed he recalled my letter of February 23, 1978, including the specific reference to Mr. Elzufon's association with Mr. Tybout. Mr. Kohn related Mr. Unger asked him to relate that fact to the court and thus correct any erroneous statement concerning Mr. Unger's knowledge of Mr. Elzufon's association with Mr. Tybout at the next proceeding before the court scheduled for Monday, February 4. Mr. Kohn advised me, however, Mr. Unger instructed him to proceed with the motion to disqualify.

Now, the motion to disqualify went forward because our client said we had no right to waive.

Now I would like to talk about the letter of February 23 a moment. When this issue came up, I was out of town—maybe out of the country, but at least, out of town and unavailable. I asked Mr. Kohn to go through all of the records that we had in this matter to see if there was any letter from Mr. Moore that indicated that he had advised me of Mr. Elzufon's association with Mr. Tybout. Mr. Kohn did that. There was nothing in any of our files that indicated that, and the reason that there was not is that the letter to which Justice Moore refers is a letter that he wrote to me concerning the conduct of Mr. Welch——

Senator HATCH. Are you referring to the February 23 letter?

Mr. UNGER. Yes; the February 23 letter. That was the letter in which he suggested I retain Mr. Tybout to bring suit against Mr. Welch, and I kept it in a personal file. I did not think the comments should be in a trial file where anybody in the office could see it. It was locked away. And in passing in that letter, he mentioned that Mr. Elzufon was with Mr. Tybout. And when I was able to be reminded, if you will, by Mr. Moore's letter, I got that letter out, and I read it, and in that letter, sure enough, it said that. And I asked Mr. Kohn to tell Justice Moore, then Mr. Moore, and tell the court that I was in error, that he had in fact advised me on February 23, in a different matter, but he had in fact advised me; I had letent, if not actual, knowledge. And I did try to straighten it out.

Senator HATCH. Why didn't you notice it in the letter to begin with?

Mr. UNGER. It was in a letter that was written to me about the conduct of one of the witnesses against me here, in which Mr. Moore recommended retaining Mr. Tybout to sue him. And that was in February 1978. This issue was arising like 2 years later. It was not in the file. I specifically asked that Mr. Kohn check the trial file and all the correspondence.

Senator HATCH. So you had taken this letter and locked it away.

Mr. UNGER. I put it in a personal file and locked it up. I did not put it in the trial file.

Senator HATCH. Had you forgotten about it?

Mr. UNGER. Yes. I did not bring any action. The letter will speak for itself when it is handed out here. And I had no recollection of that particular passage. I was reading the letter to consider whether or not I wanted to bring a personal action against Mr. Welch.

Senator HATCH. So even though a mistake was made here, it was an inadvertent mistake.

Mr. UNGER. And not only that; I am saying I tried to straighten it out. Mr. Moore's affidavit indicates that.

Senator HATCH. Did anybody suffer as a result of that affidavit?

Mr. UNGER. Not to my knowledge.

Senator HATCH. Did anybody lose any money, or was any case decided as a result of that affidavit?

Mr. UNGER. Not to my knowledge. I might admit I was embarrassed about the affidavit, as well, being in error, and I never appeared again in Wilmington.

Senator HATCH. So it embarrassed you——

Mr. UNGER. Yes; I did try to correct it. Mr. Moore's affidavit will indicate that I tried to correct it. And you can see that——

Senator HATCH. Did you explain this to Justice Moore, or then Mr. Moore?

Mr. UNGER. He withdrew from the case. My information from Mr. Kohn is that things were very uncomfortable between either one of us. I explained it to him when I saw him today. He knew exactly what I was talking about. He said he had the letter with him, but it was not in the papers he was prepared to give to the committee.

I found some difficulty also with Mr. Moore's testimony concerning my confidence that Judge Gartner would not appoint a trustee. Sequentially, it does not work out that way. Judge Gartner had made no indication he would not appoint a trustee until after the Freidco trustee appointment order was given to him. I had no knowledge of what Justice Gartner would do prior to that, and I did not give him that order. It was a sequential problem. I still considered it a high risk and would not have brought that order to Judge Gartner myself.

Senator HATCH. So before the relationship with Mr. Moore ended, you were having difficulties with each other?

Mr. UNGER. No; subsequent to his withdrawal, we did not talk to each other. Before that, we were——

Senator HATCH. I see. Was it because of this affidavit?

Mr. UNGER. It was his interpretation of my affidavit. My affidavit was in error. I tried to have it straightened out. The problem was that when I signed the affidavit, we went through the trial file. There was nothing in the trial file to indicate that Mr. Elzufon had——

Senator HATCH. Because you had taken that letter and locked it away.

Mr. **Unger**. That letter, I did not consider a part of the trial file. I considered it a personal thing. I locked it up. It says some negative things about another lawyer, and I did not think it needed to be in the——

Senator **Hatch**. As a practical matter, you had forgotten about the letter, because it was not in the file.

Mr. **Unger**. That is right. When he reminded me, I went to the letter, I found it. What he said was in there was in there.

Senator **Hatch**. So you realized that you were in error, and you tried to correct it.

Mr. **Unger**. And it is corrected in Mr. Moore's affidavit, paragraph 11.

Senator **Hatch**. I will ask one other question of you at this time. Am I correct that Senator Specter established in my absence that you discussed substantive matters during your ex parte meeting or meetings with Judge Gartner?

Mr. **Unger**. We discussed the application for reconsideration. If that is a substantive matter, that is what is established.

Senator **Hatch**. Who initiated that, you or the judge?

Mr. **Unger**. I told the judge that I could think of nothing that could be done, unless there was an application for reconsideration filed, and he directed me to file one.

Senator **Hatch**. If you can remain, Mr. Unger, I would like to hear Mr. Van Dusen at this time.

Mr. Van Dusen, I do not think we have sworn you in.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Van Dusen**. I do.

Senator **Hatch**. Thank you. We will be happy to take your statement at this time.

STATEMENT OF RICHARD C. VAN DUSEN, FORMER UNDER SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Mr. **Van Dusen**. Mr. Chairman, I am Richard Van Dusen. I am an attorney in Detroit.

Between 1969 and 1972, I was the Under Secretary of the U.S. Department of Housing and Urban Development. During part of that period, Mr. Unger was the General Counsel of Housing and Urban Development.

As I think the committee is aware, because I could not be here when you met last week, I submitted a written statement. I understand that there were some questions about it, and I know that it is difficult to question a statement. So I am pleased that I am able to be here in person today, and I will be happy to respond to questions.

I do have a few things that I would like to say at the outset which might be helpful. I do not want to take your time unnecessarily, so I am certainly not going to repeat the statement which I previously submitted in writing.

I would like to review briefly, however, the events described in that statement involving the chairmanship of the Federal National

Mortgage Association—Fannie Mae—and the termination of Mr. Unger's service at the Department of Housing and Urban Development in 1970.

Now, at the outset, I should comment on the portion of my written statement regarding Mr. Unger's opinion that Gen. Lucius Clay had a conflict of interest which precluded his service on the Board of Directors of Fannie Mae. Until yesterday, when I was informed of last week's testimony before this committee, I had forgotten the opinion regarding the alleged conflicts of interest of several Fannie Mae directors, including General Clay, which was signed by Mr. Ruediger, the Assistant General Counsel of the Civil Service Commission. It had been my recollection that the opinion that there was such a conflict had been given by Mr. Unger. I now recall the Ruediger opinion, which Mr. Unger requested and obtained. However, it continues to be my recollection and belief that the conflict issue originated with Mr. Unger, who used the Ruediger opinion to support the proposition that General Clay had a conflict. And it is important, I think, that the committee know that neither Secretary Romney nor myself, as the officers of the Department of Housing and Urban Development to whom Mr. Unger reported, had requested him to obtain any such opinion or, indeed, to conduct any research on the subject; nor, so far as I know, had anyone at Fannie Mae. The conflict issue, therefore, was raised so far as I can recall and understand entirely on Mr. Unger's initiative.

Now, I think it would be helpful to the committee if I undertook to put that allegation of conflict of interest in a context which is, I believe, relevant to the matter under consideration here.

Fannie Mae, at the beginning of 1970, was in the process of transition from being a Government-owned corporation to being a privately owned corporation, owned by stockholders, and that transition occurred under the supervision of the Secretary of Housing and Urban Development, who was George Romney. Among the things that had to be done as a part of the transition was the selection of an original group of 15 directors, 10 of whom were to be elected by the shareholders and 5 of whom were to be appointed by the President of the United States.

Mr. Unger, as General Counsel of the Department, participated fully and actively with Secretary Romney and myself and with Oakley Hunter, the president of Fannie Mae, and with others, in the selection of persons to serve on Fannie Mae's first 15-member Board. During the course of that consideration, he raised no question of conflict of interest with respect to any of those who were chosen to serve.

Now, after the Board had been chosen, Mr. Unger advised Oakley Hunter, the President of Fannie Mae, that he, Mr. Unger, would like to be the Chairman of the Board of Fannie Mae. Mr. Hunter indicated to Mr. Unger that because Fannie Mae had just gone private and because Mr. Hunter wanted to established Fannie Mae's credibility and stature in the private financial community, he thought it was important that Fannie Mae have as its Chairman not someone who was in government, as Mr. Unger was, but a distinguished private citizen. And Mr. Hunter indicated to Mr. Unger that he had selected Gen. Lucius Clay, a man of distinguished background who was then a partner in Lehman Bros., to serve as the Chairman.

Nevertheless, Mr. Unger persisted in his interest and desire to be chosen as the Chairman. Secretary Romney became involved and concurred with Mr. Hunter in the choice of General Clay as Chairman of Fannie Mae, and General Clay was then selected.

Thereafter, for the first time so far as I know, and entirely on his own initiative, Mr. Unger raised the issue of alleged conflict, which would preclude not only General Clay's service as Chairman, but General Clay's service as a member of the Board of Directors of Fannie Mae. Now, as I indicated earlier, I had forgotten until yesterday that Mr. Unger procured an opinion from Mr. Ruediger. So far as the Secretary and I were concerned, Mr. Unger was the source of the conflict issue. He was the one who raised it and urged that it precluded General Clay's service.

Now, because of the circumstances involving the selection of General Clay as a member of the Board, and the circumstances involving the Secretary's involvement in General Clay's appointment as the Chairman of that Board, this was a source of embarrassment to the Secretary and to the Department, because the Department had the responsibility for supervising this transition.

It became necessary for the Department to request and obtain an opinion from William Rehnqust, then the Assistant Attorney General in the Office of Legal Counsel in the Department of Justice, that no conflict existed, and I believe the committee has as a part of its record Mr. Rehnquist's opinion.

Now, as I indicated in my written statement, this sequence of events convinced Secretary Romney and me that Mr. Unger put his personal interest and ambition ahead of the Department's interests and that we simply could no longer trust him to carry out the responsibilities of General Counsel of HUD, and we requested his resignation. Mr. Unger at first agreed, but asked if he could stay on until a successor was chosen, and this was acceptable to Secretary Romney and myself.

However, a few months later, when the nomination of Mr. Unger's successor was sent to the Senate, Mr. Unger had not yet resigned, and the Senate, quite understandably, was reluctant to act on the nomination of his successor unless it could be assured that a vacancy existed. Mr. Unger was advised of this situation and was asked for the formal resignation. He declined to provide it. It then became necessary, through the intervention of Peter Flanagan, the assistant to the President, to obtain a letter from the President, relieving Mr. Unger of his position as General Counsel of HUD.

As I have indicated in my written statement to the committee, I have had virtually no contact with Mr. Unger since he left the Department of Housing and Urban Development. My appearance before the committee this afternoon is the result of my having been contacted by the American Bar Association Committee on the Federal Judiciary and asked if I had information relevant to the appointment, and after I provided the information which is summarized in my statement, I was asked if I would testify before this committee, and believing that to be my professional responsibility, I am here.

Senator HATCH. OK. I have a few questions. Are you saying that the opinion was provided by Mr. Ruediger, but it was instigated by Mr. Unger?

Mr. VAN DUSEN. That is correct.

Senator HATCH. What was Mr. Ruediger's position? Was he General Counsel to the Civil Service Commission?

Mr. VAN DUSEN. Mr. Ruediger as I understand it, was an Assistant General Counsel of the Civil Service Commission, and I believe the committee might find it useful to interrogate Mr. Unger about whatever association he may have had with Mr. Ruediger or why he chose to seek the opinion of Mr. Ruediger.

Senator HATCH. We will ask those questions. Do you know of any relationship between them?

Mr. VAN DUSEN. Senator, I hesitate to suggest any, because frankly, the events are 13 years old. I do not know Mr. Ruediger, but I have some vague recollection that Mr. Unger has some acquaintance with him.

Senator HATCH. In his job as General Counsel of HUD, did he have any authority over Mr. Ruediger? Or did he have any authority over anything having to do with the Civil Service Commission?

Mr. VAN DUSEN. No, no.

Senator HATCH. Now, you have indicated that, No. 1, you feel that the criticism of General Clay, raising the conflict of interest, came from Mr. Unger, even though Mr. Ruediger wrote the opinion?

Mr. VAN DUSEN. Yes.

Senator HATCH. OK. No. 2, that Mr. Unger wanted that position for himself?

Mr. VAN DUSEN. That is correct.

Senator HATCH. And, No. 3, he continued to press for that position, even though Secretary Romney, the leader of Fannie Mae, and yourself had decided to give this position to General Clay?

Mr. VAN DUSEN. That is correct.

Senator HATCH. Are you asserting here that Mr. Unger acted with impropriety as far as wanting the position?

Mr. VAN DUSEN. No.

Senator HATCH. Then he had a right to ask for it, press for it, and a right to want the position.

Mr. VAN DUSEN. Certainly, certainly.

Senator HATCH. Are you asserting that Mr. Unger acted improperly? You believe that he caused Mr. Ruediger to file the opinion, but you do not know for certain.

Mr. VAN DUSEN. I believe that he did, because Mr. Ruediger's opinion says that it responds to a letter from Mr. Unger, setting out facts alleged to involve a conflict of interest.

Senator HATCH. OK. Let's assume that is true, and he asked Ruediger to write an opinion.

Mr. Unger, did you have a relationship with Mr. Ruediger? Did you know him?

Mr. UNGER. I have no recollection of Mr. Ruediger.

Senator HATCH. Well, let's assume that there was no relationship with Mr. Ruediger, but he wrote a letter to the Civil Service Commission and asked Mr. Ruediger to give an opinion. Do you have a copy of the letter, Mr. Unger? Do you recall writing a letter to Mr. Ruediger?

Mr. UNGER. No, sir, I do not. I recall a meeting in my office—I believe Mr. Margulies will testify about it; he was there—in which three people from the Civil Service Commission came over, and I explored the problem with them. I cannot tell you any one of the three, or whether Mr. Ruediger was even one of the three.

Senator HATCH. But did you mention to them that you felt he might have had a conflict of interest at the time?

Mr. UNGER. I said that there could be a conflict of interest situation here; if one does a careful reading of Mr. Ruediger's letter, Mr. Ruediger wrote a rather learned opinion, saying why he thought there was a conflict.

Senator HATCH. I understand Mr. Margulies, who is familiar with that meeting, is in the room.

Is Mr. Margulies here?

Mr. MARGULIES. I am Mr. Margulies.

Senator HATCH. Were you there, Mr. Margulies?

Mr. MARGULIES. I was in the room——

Senator HATCH. Please come up here.

Senator METZENBAUM. Can I inquire of Mr. Van Dusen first?

Senator HATCH. Sure, but first let me swear in Mr. Margulies, Mr. Margulies, please stand and be sworn.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. MARGULIES. I do.

TESTIMONY OF IRVING MARGULIES, DEPARTMENT OF COMMERCE

Senator HATCH. Were you in this meeting that Mr. Unger has discussed?

Mr. MARGULIES. Yes. Let me say at the outset that I——

Senator HATCH. First of all, what was your position at the time?

Mr. MARGULIES. I was at that time an Assistant or Associate General Counsel at HUD. I worked for Mr. Unger, and some of the work for which I was responsible at that time was standards of conduct or conflict work in the Department.

Senator HATCH. I see. Now, were you invited to a meeting with Mr. Ruediger at that time?

Senator METZENBAUM. Before you get to that, you work with Mr. Unger now, right?

Mr. MARGULIES. I presently am the Deputy General Counsel of Commerce, and work for Mr. Unger.

Senator METZENBAUM. Thank you.

Senator HATCH. Are you an attorney?

Mr. MARGULIES. Yes, sir.

Senator HATCH. Where are you licensed to practice?

Mr. MARGULIES. In the District of Columbia.

Senator HATCH. And you were invited to this meeting that Mr. Unger mentioned?

Mr. MARGULIES. Yes, I was.

Senator HATCH. Describe the meeting; when it took place, who was there, and what happened.

Mr. MARGULIES. I cannot give you the precise date. It was sometime, I think, in June of 1970. I was called to the meeting——

Senator HATCH. Do you have any notes or documents pertaining to that meeting.

Mr. MARGULIES. No, I do not. It is entirely recollection.

Senator HATCH. So you are testifying on your own recollection?

Mr. MARGULIES. Purely on recollection.

Senator HATCH. OK.

Mr. MARGULIES. I was asked to come to the meeting by Mr. Unger's secretary, late. I was not invited to the meeting early, and I showed up not knowing what I would bump into when I got into the room. It was only after I got into the room that I met three people, whose name I did not know, and primarily listened to a discussion. The discussion was primarily directed to the propriety of Gen. Lucius Clay serving with Fannie Mae. The issue was whether or not his position at Lehman Bros., which did sales work for Fannie Mae—that is to say, Fannie Mae issued some of their paper through Lehman Bros.—whether his position with Lehman Bros. and his position on the Board of Fannie Mae constituted such a conflict that it would preclude him from serving.

Senator HATCH. Did Mr. Unger ask you to make those comments or did you raise them?

Mr. MARGULIES. I do not recall that I made any comments at the meeting.

Senator HATCH. Then you were there as an observer.

Mr. MARGULIES. I don't know if I was to be an observer. I was asked to attend and attended.

Senator HATCH. Tell us what happened.

Mr. MARGULIES. There was a general discussion that went on for perhaps 45 minutes with the three——

Senator HATCH. Would you pull the microphone a little closer so everybody can hear?

Mr. MARGULIES. There was general discussion for perhaps 45 minutes between the three people from the Civil Service Commission and Mr. Unger as to whether or not one who served with a firm that could benefit financially from a decision in which he participated with Fannie Mae could also serve with Fannie Mae. There was no conclusion reached at this meeting. The people who had come did not reach any conclusion at this meeting; they listened. There was explanation of what the position of General Clay would be. They left. I left. And that is as much as I can tell you about that meeting.

Senator HATCH. Who raised the issue to begin with? Was it Mr. Unger?

Mr. MARGULIES. It was Mr. Unger's meeting, in Mr. Unger's office.

Senator HATCH. And he raised the issue. Who else was there?

Mr. MARGULIES. Three men. I cannot recite their names, who had come and who introduced themselves at the time as being from the Civil Service Commission.

Senator HATCH. Can you tell us, Mr. Unger, who those three men were?

Mr. UNGER. To the best of my recollection, I believe it was the General Counsel and two associates.

Senator HATCH. Was Mr. Ruediger one of them?

Mr. UNGER. I am not certain. I remember no names. I would presume, though I do not know.

Senator HATCH. OK. Was a conclusion reached at that meeting?

Mr. MARGULIES. There was no conclusion reached at the meeting.

Senator HATCH. Was there general discussion. If so, of what?

Mr. MARGULIES. There was general discussion, and then the three people from the Civil Service Commission were going to go back and reach some conclusion as to whether this presented a problem.

Senator HATCH. Mr. Van Dusen, let's assume that happened. Let's assume that Mr. Unger did want this position. Do you think that it was a legitimate question, inasmuch as General Clay did work for Lehman Bros. and, according to Mr. Margulies, they did do work with Fannie Mae? And was it the type of a question that should have been raised in the presence of Mr. Margulies and the General Counsel of HUD?

Mr. VAN DUSEN. It is the type of question which, if it were legitimate enough to warrant the attention it eventually received, should have been raised by the General Counsel of the Department of Housing and Urban Development at the time he was considering the selection of the people who were chosen to serve on the Board.

Senator HATCH. Sure.

Mr. VAN DUSEN. It was the timing with which the issue was raised which caused the Secretary and me to conclude that we no longer had confidence in Mr. Unger.

Senator HATCH. Fine.

Senator METZENBAUM. Wasn't it also the self-interest of the person who was raising the question that caused you much disturbance?

Mr. VAN DUSEN. I thought that that was inherent, Senator, in my reference to timing, and I should have made it more explicit.

Senator HATCH. Mr. Margulies, did you consider the issue a fair issue as raised at that time?

Mr. MARGULIES. Yes. I want to say that. I think that you have two opinions in your files, now, the opinion of Mr. Ruediger and the opinion of Justice Rehnquist. I considered after it was raised—I regret to say I did not consider it before it was raised, but I considered it after it was raised—an extremely serious issue, and as I reread these two opinion now, I must say that while I am a great admirer of Mr. Justice Rehnquist, I do believe honestly that Mr. Ruediger has much the better of this argument.

You will note that Mr. Rehnquist's opinion gets off the hook, if you will, solely on the basis of characterizing the then Fannie Mae as not a Federal agency. The question as to whether or not Fannie Mae was a Federal agency was not even discussed in that room with the Civil Service people. That was an assumption that was made. I think none of us at that time had the feeling that Fannie Mae had progressed so far into the private sector that they were no longer a Federal agency. Indeed, there have been court decisions even recently still calling them a Federal agency.

Senator HATCH. There was indication here that Mr. Unger was interested in the position at Fannie Mae. Would you have considered it improper for him as General Counsel, even if he was interested in the position himself, to raise the question of ethics with regard to General Clay?

Mr. MARGULIES. I have succeeded with 30 years of Federal practice by not going into the motives of those I work for. I just do not do that. I will not do it now. I cannot.

Senator METZENBAUM. That is smart. You have still got your job, Mr. Margulies.

Mr. MARGULIES. Really, you did not have to say that. I have not worked that way in my career.

Senator METZENBAUM. I know, but the fact is, was it disclosed to you when Mr. Unger called that meeting, and you and three other people were there, did he disclose to you that he was a candidate to be Chairman of that Commission?

Mr. MARGULIES. No, sir, he did not.

Senator METZENBAUM. And do you not think, after 30 years of Government service, that a person who is seeking to become the chairman of a commission owes it to his associates and those with whom he is raising questions to disclose that he has a personal self-interest when he is raising the question of conflict of interest for others?

Mr. MARGULIES. Well, the first thing I want to say, Senator, is that he did not raise that question with me. While he invited me to the meeting, he did not address that question to his own staff. I do not know whether he addressed it to the Civil Service Commission or not, but he did not address that question to me.

Senator METZENBAUM. You mean he did not make known——

Mr. MARGULIES. He did not ask me to write an opinion that that was not——

Senator METZENBAUM. I understand that, but he did not make known to you that he had a personal interest in getting a conclusion indicating that the man who was to be named chairman——

Mr. MARGULIES. No, he did not.

Senator HATCH. Mr. Van Dusen, did he make it known to you that he would have liked to have had that position?

Mr. VAN DUSEN. Yes, he did.

Senator HATCH. And did he make this comment to former Secretary Romney?

Mr. VAN DUSEN. Yes. What he did not make known to us was that he considered the service of General Clay on the Board a conflict of interest until he had procured the opinion from the Assistant General Counsel of the Civil Service Commission.

Senator HATCH. Let's go back for a second. Let's give Mr. Unger the benefit of the doubt. You both admit that you had difficulties at the time. But let's assume that he wanted the position. He said he does not recall meeting Ruediger or learning his name before this matter. He also said that he had not requested an opinion, but admits that there was a meeting where they did discuss the ethical problem. Mr. Margulies says that the meeting prompted a legitimate discussion.

There is nothing wrong with that.

Mr. VAN DUSEN. Senator, the existence of the issue and the exploration of the issue was, in and of itself, and in the abstract, perfectly legitimate. It was an interesting legal question. What I have tried to get across is that it was the manner in which Mr. Unger conducted himself——

Senator HATCH. You have made that clear.

Mr. VAN DUSEN [continuing]. Which caused Secretary Romney and myself to lose confidence in our ability to trust him or in our ability to have him continue in the post.

Senator HATCH. Well, the only thing I am saying is this. Even assuming that Mr. Unger did ask Mr. Ruediger for the opinion, he did not write it for him. Second, Mr. Margulies says it was a good opinion and much better reasoned than even present Justice Rehnquist's opinion was in return; and third, even though you might find it self-serving for Mr. Unger to want to get Fannie Mae, there was a question whether there was a conflict of interest with General Clay, and he, as General Counsel, had that obligation to bring it up.

Mr. VAN DUSEN. Senator, I said this before, and I will say it again. If he really thought there was a conflict of interest, he had the obligation to bring it up at the time when we were considering General Clay as a member of the Board.

Senator HATCH. Are you saying he did not bring it up at that time?

Mr. VAN DUSEN. He did not bring it up then. He only brought it up after Mr. Unger had asked for the position as Chairman of the Board and had been turned down in favor of General Clay, and then he raised the issue, and not only raised it with respect to General Clay, but raised it with respect to the three other persons whose appointments he had considered.

Senator HATCH. What if he raised it solely in self-interest? Mr. Margulies says it is a legitimate issue.

Mr. Unger, you were shaking your head. What was the problem with that statement, from your viewpoint?

Mr. UNGER. I did not have a recollection of General Clay being on the Board at the time I raised the conflict issue, though Mr. Van Dusen may be more precise in his memory.

Senator HATCH. OK.

Mr. UNGER. I thought that there was an election for putting on members.

Senator HATCH. Well, who is right on that?

Mr. UNGER. I think I raised the question concerning four members of the Board that were doing business with Fannie Mae, not just General Clay.

Mr. VAN DUSEN. That is true—three Presidential appointees, and General Clay, who was a stockholder——

Senator HATCH. Did he raise it for all four of them?

Mr. VAN DUSEN. Yes.

Senator HATCH. OK.

Mr. UNGER. I thought it was a legitimate issue.

Senator HATCH. Mr. Margulies, as the person in charge of this, did you think it was a legitimate issue?

Mr. MARGULIES. I was not asked. I was a little offended, perhaps, that I was not asked. I thought in truth then that there was a distinction between three of the members, who received compensation indirectly solely because they were with companies who serviced mortgages. I thought their positions were very different from General Clay's position. Now, that is a personal statement; it is a lawyer's statement, as I would have addressed the problem. I thought there was a long history about people who served with mortgage companies which retained the servicing of mortgages they had sold to Fannie Mae, and the position of General Clay, who would have a totally different kind of operation—that is to say, he had a financing outfit outside that did different things than service mortgages.

Senator HATCH. Are you saying that it was a legitimate issue to raise?

Mr. MARGULIES. I thought the Clay issue was an extremely legitimate and very interesting issue to raise.

Senator HATCH. Mr. Van Dusen, I appreciate your testimony. I can understand that you wanted somebody with less self-interest displayed, and that is a legitimate management decision.

My only question is, even If Mr. Unger had self-interest, even if he wanted the position, even if he requested the opinion from Mr. Ruediger, which was a balanced, intelligent legal opinion, his raising the issue was not improper, at least according to Mr. Margulies. It was a question of conflict of interest. It was not unethical or improper for him to do that. Mr. Unger says it was not even done the way you say it was, and Mr. Margulies tends to back him up that at least it was a legitimate issue.

I cannot question your management decison and I cannot question personality conflicts. But I do question whether this is significant enough issue to render Mr. Unger to be unacceptable as a circuit court judge. And the statements of Mr. Unger and Mr. Margulies are not the same as your statement.

Mr. VAN DUSEN. Senator, that is a judgment you are going to have to make. I am here only to lay out the facts which I deem relevant to your consideration of the decision which you have to make. And I know that you recognize it to be a very important decision, and I trust you will consider it with the deliberation and the care that it deserves.

Senator HATCH. Mr. Van Dusen, this committee is very appreciative that you come all the way from Michigan to testify on this matter. On the other hand——

Mr. VAN DUSEN. If you are going to say, "On the other hand, it is time for you to go," I will agree with you, Senator. [Laughter.]

Senator HATCH. No, no.

Senator Metzenbaum. No. Senator Hatch is going to get done soon, and then I am going to have some questions.

Senator HATCH. Go ahead.

Senator METZENBAUM. You are done; good.

Mr. Unger, you testified the other day, Friday, that when Fannie Mae was going through its change from public to private, there was an issue raised.

> It was first brought to me since HUD had oversight on whether or not there could be a conflict of interest with serving on the Board and also doing business with Fannie Mae. I was on the Board of Fannie Mae. I said I would not touch that with a 10-foot pole. That is not my responsibility.

If you would not touch it with a 10-foot pole, and you say there was an issue raised, all the facts that we have before us this afternoon indicate that you raised the issue, that you did touch it with less than a 10-foot pole, that you called a meeting with Mr. Margulies and the Civil Services Commission, and that you wrote to Mr. Ruediger and raised this issue. Now, which is the fact? Did you touch it with 10-foot pole or less, or did you stay away from the issue?

Mr. UNGER. I did not write the opinion. I got samebody, an independent agency that had more experience than I did, to write it, and I had no idea what the conclusion would be, Senator——

Senator METZENBAUM. Who raised the issue?

Mr. UNGER. They might have said that there was no conflict. Everybody is assuming, particularly Mr. Van Dusen, since he did not like their conclusion, that somehow I controlled the opinion. They could have just as easily written an opinion and said there was no conflict. Then we would have had a resolution.

Senator METZENBAUM. who raised the issue?

Mr. UNGER. I believe, somebody on the Board. As I remember, Mr. Lance, but I am not positive. He was one of the people I thought would cover it.

Senator METZENBAUM. And did you not feel it appropriate when you were calling meetings and writing letters, didn't you feel it appropriate to disclose that you had a personal self-interest in indicating a conclusion that Gen. Lucius Clay might have a conflict of interest?

Mr. UNGER. I did not want to indicate a conclusion one way or the other to anybody. I wanted an independent conclusion. That is why I went to the Civil Service Commission.

Senator METZENBAUM. And when you wrote to them, you indicated that you thought there might be a conflict of interest, or you raised the question of whether there was a conflict of interest?

Mr. UNGER. I wanted the conflict of interest issue resolved. Their opinion would do that. It certainly would have done it if they said there was no conflict.

Senator METZENBAUM. And when Justice Rehnquist responded, and when Mr. Rudiger responded, they all referred to the fact of your inquiry relative to a possible conflict of interest situation; and yet, you say you would not touch that issue with a 10-foot pole.

Mr. UNGER. What I meant is I would not write the opinion while I was on the board; that is correct.

Senator METZENBAUM. But you would not mind raising the issue.

Mr. UNGER. I am not sure that I initiated it as you are.

Senator METZENBAUM. Now, let us see a copy of the June 9, 1970, letter to Mr. Ruediger.

Mr. UNGER. I do not have a copy. Do you mean my letter to Mr. Ruediger?

Senator METZENBAUM. Yes.

Mr. UNGER. We have asked them for it, and they destroy every 2 years.

Senator METZENBAUM. Well, don't you have a copy of it?

Mr. UNGER. No.

Senator METZENBAUM. Mr. Unger, before this hearing is concluded, I will try and put into the record the number of documents that you have indicated that you do not have, and also compare that with the number that you do, because it is this Senator's opinion that those documents that do not serve your purpose seem to be lost somewhere along the way, and those that do serve your purpose seem to appear, sometimes during the hearing, even as late as today.

Mr. **Margulies**. Well; I would point out, Senator, that those documents, if they were available, would be in somebody else's possession. We have tried to get those documents from both the Civil Service Commission and the Department of Justice. We have asked them to go through Rehnquist's files to find that incoming letter and we have asked them to go through Mr. Ruediger's files. We were not able to get them.

I personally doubt that the letter to Rehnquist exists; I have never heard of it.

Senator **Metzenbaum**. But Mr. Margulies, if you asked me for a letter that I wrote in 1970, I would tell you that my guess is we can find it, because we just do not destroy letters, particularly as important is this kind of a letter; and even the letters we have written as U.S. Senator, as a public official, we have not destroyed, and we have put them into a place where they can be——

Mr. **Margulies**. I am saying to you that at least with respect to the letter to Rehnquist, I have grave doubts that there is any letter——

Senator **Metzenbaum**. I am not talking about the Rehnquist letter. I am talking about the letter from Mr. Unger to Ruediger.

Mr. **Unger**. May I respond to that, Senator?

Senator **Metzenbaum**. Yes.

Mr. **Unger**. A copy of that letter would have been a public docunment, left at HUD. It was not my personal property.

Senator **Hatch**. Did you take all your files away from HUD when you left?

Mr. **Unger**. I certainly did not. I left them at the Department.

Senator **Hatch**. I would be surprised if you did.

Senator **Metzenbaum**. Did you take any?

Mr. **Unger**. I took my personal papers, yes. This was not a personal paper of mine.

Senator **Metzenbaum**. Mr. Van Dusen, excuse me for asking this, but I gather that you were a part of the Republican team when you were serving down here?

Mr. **Van Dusen**. Yes, sir, and proud of it.

Senator **Metzenbaum**. It is interesting, I might say, Mr. Chairman, I think most of the witnesses who have been against Mr. Unger have been Republicans.

Senator **Hatch**. A number of them that are for him have been Democrats; I have been interested in that—and I might add, very topflight Democrats—not that there are any that are not topflight.

Senator **Metzenbaum**. Well, as a matter of fact, I am sorry I was not here when one of them was here, to see what his special interest was, and if he comes back, I would like to inquire of him.

You are a member of the law firm of Dickinson, Wright, Moon, Van Dusen, & Freeman, in Michigan?

Mr. **Van Dusen**. That is correct.

Senator **Metzenbaum**. How big a firm?

Mr. **Van Dusen**. About 125 lawyers.

Senator **Metzenbaum**. You are a senior partner?

Mr. **Van Dusen**. Yes, sir.

Senator METZENBAUM. You have had some experience with Mr. Unger. You certainly know of the caliber of the people that we want on the district court, the Supreme Court, the circuit court of appeals. In your opinion, based upon your relationship with Mr. Unger, do you feel that he has the judicial temperament and the integrity to be a member of the circuit court of appeals?

Mr. VAN DUSEN. Senator, I have to preface my response by indicating, as I did in my written statement, that I have had virtually no contact with Mr. Unger for almost 13 years.

Therefore, I cannot, otherwise than on the basis of the same information which is presented to you here, make a personal judgment with respect to his present qualifications in terms of temperament, judgment, and so on. My opinion is necessarily based on the experiences of 1969 and 1970, and as I indicated in my written statement, I did not believe that at that time, Mr. Unger possessed the qualities of judgment and temperament which I feel would be necessary and appropriate in a Federal judge.

Senator METZENBAUM. I thank you very much, Mr. Van Dusen. I appreciate your being here.

Senator HATCH. Mr. Van Dusen, I want to thank you, also. I know that your only goal here is to help the committee and the American Bar Association in these matters.

Mr. Margulies, do you have anything else you would like to add?

Mr. MARGULIES. Yes; I would like to add a little, because I have worked with Mr. Unger for a long period of time.

Senator HATCH. Mr. Van Dusen, if you have to catch a plane, we would be happy to excuse you at this time.

Mr. VAN DUSEN. Well, as a matter of fact, oddly enough, Senator, I have a dinner engagement across the street.

Senator HATCH. Well, it has been nice to have you here.

Mr. VAN DUSEN. Thank you.

Senator METZENBAUM. Mr. Chairman, Mr. Margulies is located here, and the hour is growing late, and I have the president of Republic Steel out here, and I am wondering whether he could not return tomorrow, and instead of that, if there are a couple of words that the Justice wants to respond or say further—and I do not know that he does—I wonder if our time could not be better used, and it would not be an imposition on Mr. Margulies to ask him to come back tomorrow.

Senator HATCH. Mr. Margulies, how much longer would it take you to make your statement?

Mr. MARGULIES. It would take me no longer than 90 seconds to say what I have to say.

Senator HATCH. OK, say what you have to say.

Mr. MARGULIES. I have worked with Sherm for a total of 4½ years now. I worked with him while he was General Counsel at HUD, and I have worked with him as General Counsel of Commerce. I now serve as his Deputy. I then was one of his principal associates.

I want you to know, Senator Metzenbaum, that after Sherm was fired, after he left HUD, Governor Romney gave me the Distinguished Service Award of the Department. I have the highest regard for Governor Romney and for Dick Van Dusen, who sat here next to me. These people did not get along. They differed on policy issues; they did not like each other personally. But Sherm was an excellent lawyer. Sherm had great integrity at HUD. He fought hard; he has always fought hard. He had a program point of view, and he enunciated that program point of view. He differed with the Governor as to whether there should be regional offices; he fought that issue very hard——

Senator HATCH. By "Governor," do you mean Secretary Romney?

Mr. MARGULIES [continuing]. Yes, sir—and of course, his advice was not appreciated. He fought every issue that he came to hard.

Sherm Unger was a different man at HUD than he is now. He was younger; he was flamboyant; he was abrasive, he had a cut of star quality. Sherm is now 12 years older, and he is a very different person. You have heard Secretary Baldrige describe this man. He is now a team player; he is far different than he was at HUD in the sense that he now submits to authority, submits to those he works for, which is an inclination or a feeling that he was not able to do at HUD. That is what got him in trouble with the Governor.

I am amazed at the testimony I have heard here. Working with this man for 4½ years, I cannot believe these attacks on his integrity. Nothing I have seen goes to this. He is a man of unimpeachable honesty. If he tells you he will be somewhere at noon, he will be there at noon. He would never lie about a case, as I know him. He would never file a false affidavit. I have seen him in trials. He is abrasive. He is a fighter. I have seen him drive counsel up the wall. I often think that is the function of a lawyer when he works for a client. I have seen him work for the U.S. Government in just that way, and he has been very effective.

That is all I have to say.

Senator HATCH. Thank you, Mr. Margulies. I think that your testimony is very important because you have worked with him.

I appreciate you taking the time to be here.

We have one additional witness before we get to Mr. Coleman and ——

Mr. COLEMAN. Senator, really, I have been here all day, and I do have a private life.

Senator HATCH. I know.

Senator MATZENBAUM. I thought we would meet tomorrow, Mr. Chairman.

Senator HATCH. We are going to meet tomorrow.

Mr. COLEMAN. I have a commitment in New York tomorrow that I have to keep.

Senator HATCH. Well, we have got this scheduled for 2 o'clock tomorrow.

Mr. COLEMAN. Well, I will submit something in writing, but I really have this commitment that I have to keep.

Senator HATCH. All right. I understand that.

Mr. COLEMAN. I have been here throughout the hearings. I flew back all night from California to be here Thursday. Tomorrow I have a commitment that is at least 6 months old. I will come in any day other than tomorrow.

Senator HATCH. Well, we can accommodate you.

Mr. COLEMAN. I really would like the time to come in and reply——

Senator HATCH. I think we can accommodate you. We can finish up everything else tomorrow except your testimony and your rebuttal to his testimony.

I must say that I have never been in a confirmation proceeding where we have let everybody testify, rebut, cross-examine witnesses out of the audience, and so forth. I think that we have been more than fair on this hearing. We are doing our best to accommodate you, Bill—I think you know that—and we will.

Mr. Coleman, you are not raising a question about our proceeding in your absence, are you?

Mr. COLEMAN. Oh, no. The only thing I would like to say is that the questionnaire is not an ABA questionnaire.

Senator HATCH. We understand that.

Mr. COLEMAN [continuing]. And any answer given in that questionnaire was given to the Justice Department as well as to the ABA.

Senator METZENBAUM. Well, Mr. Coleman, let's not get into your testimony.

Senator HATCH. Mr. Coleman, is it possible for you to submit in writing your responses here, or do you feel you have to testify orally?

Mr. COLEMAN. I would like to comment orally, because I think I can——

Senator HATCH. Then, we will do that.

Mr. COLEMAN [continuing]. Give you 11 instances in which Mr. Unger has told me falsehoods. And I would like to do it under oath——

Senator HATCH. Do you want to do it right now?

Senator METZENBAUM. Wait a minute, Mr. Chairman. Just hold the fort.

Senator HATCH. Well, I am trying to accommodate——

Senator METZENBAUM. Just a second. This man hasn't a snowball's chance in hell of getting confirmed before the recess. I mean, that is as obvious as the nose on my face. So, why should we be getting so uptight about whether we do it this moment, or 2 days after we return from the recess? I think we ought to keep our perspective. Nothing is going to happen between now and the recess, until after we return from the recess, and under those circumstances, I would like to suggest for your procedure, that if Justice Moore has any few remarks that he would like to respond or that he cares to clarify after Mr. Unger had spoken, and that we hear Mr. Coleman, or any body else that you want to schedule, immediately after the recess.

Senator HATCH. If I can get this done tonight, I will do it. Now, I do not think it is fair to Mr. Unger or anybody else to have this dragged out. I do not think he is going to be confirmed before the recess, but I do think this ought to be brought to a conclusion, like all inquisitions have to be.

Senator METZENBAUM. Well, Mr. Chairman, I do not think you ought to impose upon the members of us who are seated here. It is now 7 o'clock. I have people waiting out here, I have people waiting downtown——

Senator HATCH. Well, I do not want to impose on you, Howard, I just want to get it done.

Senator **Metzenbaum**. This man is not going to be able to testify in 10 minutes or 15 minutes. He is prepared to talk about 11 different instances of falsehood. I do not know what they are. But I think that under the circumstances, you are just crowding the situation.

Senator **Hatch**. Well, I do not want to do that. But I will say that I am prepared to stay as long as I need to stay, and I am prepared to accommodate Mr. Coleman. I am not trying to make it tough on Bill. I want Bill to have his opportunity to testify and Mr. Unger, his opportunity to rebut. I do worry about other Senators schedules, but I also worry a little bit about my own. This has really disrupted mine and I am sure it has disrupted yours. So, the only thing we can do is to do the best we can.

Now, I suggest this. We have one more witness that I think will take a short period of time; he is a character witness. I suggest we put him on.

Senator **Metzenbaum**. I would like to hear if Justice Moore has anything further.

Senator **Hatch**. Do you have any further comments you care to make, Justice Moore?

Justice **Moore**. No, sir, I don't.

Senator **Hatch**. I did not think you did.

Senator **Metzenbaum**. I did not know. I just wanted to give him a chance.

Senator **Hatch**. Let me say this. I do not know of any other judgeship hearing where we have had a demand to have rebuttals, sur-rebuttals, and everything else. People ought to testify and let the chips fall where they may. If they can enlighten the committee without being advocates, I think that is a great thing.

But we have spent most of the time on the accusations against you. Your witnesses have had like 3 minutes apiece. Lloyd Cutler, Griffin Bell, Malcolm Baldrige, Senator Packwood, Senator Warner, former Senator Hugh Scott, Ed McCabe, Presidental adviser. And we have spent all this time on these so-called accusations, many of which seem to me to be pretty trivial in nature.

Senator **Metzenbaum**. And that would seem to indicate——

Mr. **Coleman**. May I interrupt——

Senator **Hatch**. No, you may not interrupt. We are going to let you have your time tomorrow.

Mr. **Coleman**. When the witnesses you just mentioned were testifying you asked them no questions. You treated me as if somehow, I were a defendant, and yet when somebody comes in and testifies——

Senator **Hatch**. You are not the defendant, either, but I do not think you should be an advocate, Bill. I think you should state the facts and let the committee decide.

Mr. **Coleman**. Did you ask those who testified what dealings they have had with Mr. Unger's department?

Senator **Hatch**. Well, we are going to let you do that.

Mr. **Coleman**. No, not me. I am saying, if you call somebody to testify, and he gives a 3-minute statement, and you don't ask any questions, don't blame me because——

Senator **Hatch**. I agree with that. I wasn't here. I am not finding fault with that. I am just saying that most of the time has been spent on the accusations, as probably it should be.

I would like to see less advocacy and more facts. Now, if you have got 11 statements that you would like to bring out, I think that is what you should do. And let the committee make the determination. It may be exactly the way you want it, Mr. Coleman.

Let me say this. How many of us in this room, as Senators or otherwise, can recreate a paper trail for the last 15 years of our lives? I do not know if anybody can satisfy the documentary demands that we have seen demanded in this case.

Now, be that as it may, we will recess until 2 o'clock tomorrow. In the case of Mr. Coleman, we will make available to you a time when you can come in and testify.

The last witness, however, is going to be Mr. Unger, so that he can answer any questions that we may have or any questions that are raised.

Are there any other witnesses that I don't know about?

Mr. **Unger**. Mr. Campbell is here for maybe a 3-minute or 5-minute statement.

Senator **Hatch**. Mr. Campbell, why don't we take your testimony, because I know you sat here all day. Do you think you will be much more than 3 minutes? As I understand it your testimony is character testimony.

Mr. **Campbell**. That is right.

Senator **Hatch**. So it will not be an allegation-type testimony?

Senator **Metzenbaum**. Mr. Chairman, excuse me. I do not wish to be rude, but I have people waiting here for me for over an hour, so please excuse me.

Senator **Hatch**. I am sure Howard will read your testimony.

Senator **Hatch**. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. **Campbell**. I do, sir.

Senator **Hatch**. Thank you so much. Would you please introduce yourself and tell us your background, what you are doing at this time, and your relationship, if any, with Mr. Unger?

TESTIMONY OF CARLOS CAMPBELL, DEPARTMENT OF COMMERCE

Mr. **Campbell**. Thank you, Mr. Chairman.

It is a pleasure and a privilege to appear before this committee to provide my opinion, if you will, on behalf of Mr. Unger.

I am presently the Assistant Secretary of Commerce for Economic Development. I served during the administration of President Nixon at the Department of Housing and Urban Development from about May 1969 through September 1972. During the period May 1969 until about July 1970, Mr. Sherman Unger was the General Counsel at the Department of Housing and Urban Development.

Incidentally, I do not have any prepared testimony.

I would like to point out that during that time, I was the Special Assistant to the Assistant Secretary of HUD for Community Planning and Management, the late Samuel C. Jackson. During that period, I worked as a special assistant to an individual who "wore three hats." He was General Manager of the Community Development Corporation; he was the General Assistant Secretary of HUD, and also the Assistant Secretary for Community Planning and Management.

I had frequent contact with Mr. Unger. Much of that resulted from the fact that we established a close personal friendship when we went to Europe in the fall of 1969 as members of a nine-member delegation headed by Secretary Romney. Subsequently, I saw Mr. Unger on numerous occasions. At no time in the course of discussion of a variety of program issues involving the new communities and other programs did I find any cause whatsoever to question Mr. Unger's integrity. During the course of being associated with the Department of Commerce, I have had to ask for Mr. Unger to provide opinions or to assist in legal matters because of differences that I had with my own Chief Counsel, who appeared to be more interested in policy than the law, to make sure that the substantive legal issues were dealt with objectively.

I have always found Mr. Unger to be fair, to clearly be vigorous and assertive, and to be accessible. I must say that I, too, have been shocked at some of the things that I have heard today. Let me point out for the record that I am not an attorney, so I am not trying to in any way infer that I have the right or privilege to deal in substantial legal issues. I call on counsel to do that.

But I must say to you, sir, Mr. Chairman, that I am rather shocked at many of the things that I have heard, because I have always found Mr. Unger to be a man of integrity and conviction. He has always been a pleasure to work with and very responsive.

I would like to add, it you will—and I say this to try to help the committee—that when Mr. Unger was at the Department of Housing and Urban Development, he was, perhaps, from time to time the subject of discussion because he was extremely well-dressed—I do not myself recall the word "flamboyant" with any great frequency, but Mr. Unger was always a man of both, in my judgment, substance and style, and I always felt, an outgoing and a congenial person. If it is appropriate, I would like to say that I have often heard—and I say this knowing the full seriousness of this proceeding—that "Great minds discuss ideas, mediocre minds discuss events, and small minds discuss people." I have always felt it more appropriate to focus on the issues, and yet I realize central to this issue is the integrity of an individual.

I am only here to add to you my personal experience and knowledge of a man that I have a high regard for, a man that I have never lost touch with over the years. We have remained friends and colleagues from the time that we initially met. And I only want to submit this to you to weigh in your consideration.

Senator HATCH. Thank you Mr. Campbell. We appreciate your patience in waiting and we want to thank you for taking time to come in and be before this committee.

Thank you for coming.

Mr. CAMPBELL. Thank you, Mr. Chairman.

Senator HATCH. Let me say this. I feel an obligation to complete these hearings.

Now, let me ask you this. We are going to recess until tomorrow and the committee has got to make some decisions on this testimony.

I think this is the first day where you have been able to rebut these accusations against you. Mr. Coleman has information that he feels will contradict some of the things that you have said here. We will be interested in that. And he must be given an opportunity to testify.

Mr. Coleman will be gone tomorrow.

Mr. COLEMAN. Yes; I intend to take the 7 o'clock shuttle back from New York on Friday morning.

Senator HATCH. Well, I would like to complete the testimony before the recess. Is there any chance you could get back for later tomorrow afternoon?

Mr. COLEMAN. I cannot be back tomorrow. I will be on the 7 o'clock shuttle out of New York Friday morning.

Senator HATCH. Is there any chance you can be back tomorrow evening, late?

Mr. COLEMAN. No; I have a commitment in New York——

Senator HATCH. Right, but I mean, can you be back tomorrow evening?

Mr. COLEMAN. No; I cannot be back Thursday evening. I have a meeting that starts at 2 o'clock.

Senator HATCH. OK. Can you be here Friday, because I would like to conclude this, and I think you would like to conclude it.

Mr. COLEMAN. I can be here any time after——

Senator HATCH. Well, I appreciate your accomodating the committee. I do want Senators Specter and Metzenbaum to have the opportunity to be here, but I think there is some obligation to adjust schedules. I would like to recess until 2 o'clock tomorrow, and then recess tomorrow to take Mr. Coleman's testimony—would 9:30 a.m. be all right?

Mr. COLEMAN. Assuming the 7 o'clock Eastern shuttle is on time, I can be here——

Senator HATCH. Well assuming that is so, we would start with you at 9 a.m. Friday morning.

Senator METZENBAUM. Mr. Chairman, I have no problem with that——

Senator HATCH. OK. I appreciate it.

Senator METZENBAUM [continuing]. Wait a minute. I have not finished. But I assume that if the U.S. Senate is not in session on Friday, you would not expect to be here, and I wouldn't either.

Senator HATCH. I expect to be here. I need to go to Utah, but I want to conclude this.

Senator METZENBAUM. But if we are in recess, I don't think——

Senator HATCH. Then you ought to be here because this man sat here for 1 solid year with these kinds of accusations hanging over his head. We ought to put it to bed one way or the other.

Senator METZENBAUM. Well, it is not going to be put to bed.

Senator HATCH. Well, it will be put to bed as far as testimony is concerned, Howard. I think you ought to put yourself out to that and agree. I would like to leave Friday to Utah, but I owe some obligation to the judiciary.

Senator METZENBAUM. Are we going to be in session?

Senator Hatch. Well, I imagine we will be, but if we are not, I think we ought to conclude this. I am interested in what Mr. Coleman has to say and if Mr. Unger has responses to Mr. Coleman's testimony.

How much time do you think you would take, Mr. Coleman?

Mr. Coleman. Well, what I really wanted to do was get the transcripts of the testimony and go through those——

Senator Hatch. We have some of those.

Mr. Coleman. I think I ought to have the transcripts of the testimony taken so far. It is really unfair, Mr. Chairman, to ask me to come here on Friday, because every document that Mr. Unger has put in today, I have never seen——

Senator Hatch. We will try to provide those for you.

Mr. Coleman [continuing]. And every document that the justice from Delaware put in, I haven't seen. I have not been given the transcripts of the testimony. What I thought I could do is to go through the transcripts of testimony and the documents entered in the record, and then come in here and say, "This is what Mr. Unger first said to us, this is what he told us during the investigation, and this is what he testified to here."

Senator Hatch. I think we do have the testimony up until today. You have sat through this complete session today, and I assume you have taken notes.

Mr. Coleman. Fine, but when am I going to read them? I told you that I am going to leave on the 8:30 plane tomorrow morning for New York.

Senator Hatch. I thought you said you would be willing to go forward on Friday, sir.

Mr. Coleman. But then I realized that I would not have any time between 11 o'clock Thursday night and 9:30 Friday morning to read the documents and be prepared.

Senator Hatch. Well, I do not know how to solve that problem. To be honest with you, I think my personal preference is to get the testimony on Friday. I believe that it is only fair. I think you have listened to all of it, and you have taken notes. We can get the documents to you. If you can wait for a little while tonight, we can get the documents to you tonight, and you can take them with you to New York.

Mr. Coleman. I have a commitment to be somewhere at 6:30, Mr. Chairman.

I have eight guests coming, and my wife is there. And really, I——

Senator Hatch. Do you feel that you cannot be prepared fully for Friday?

Mr. Coleman. Not to do the type of job that I think that the public and this committee is owed. On the other hand——

Senator Hatch. Well, we all represent the public. I want you to be able to do that.

Mr. Unger, I do not know what to do. I would prefer to go ahead Friday. I would like to get his over. Let me make a suggestion.

You have taken notes. I know you are a meticulous note-taker, and I know you are a meticulous lawyer. Why don't we go ahead Friday, and if you feel at the conclusion of that proceeding Friday that you have not had adequate time, then we will continue it until after the recess and give you adequate time. But I think if we can conclude it, we ought to try and conclude it.

Senator METZENBAUM. Mr. Chairman, let me say this, that you have a reputation for being fair——

Senator HATCH. I do.

Senator METZENBAUM [continuing]. And I think that this particular hearing has somehow got you a little bit up-tight——

Senator HATCH. I just want to get it done so that I can get to other work and Mr. Unger is treated fairly.

Senator METZENBAUM. Yes, I understand that, but so do all the lawyers and the people of this country who are going to appear before Mr. Unger if he gets confirmed.

I would just like to urge upon you that you not be that pushing and crowding that you go forward with the hearing on Friday. This man is really in the role of a public servant. He is not getting paid for this.

Senator HATCH. I understand.

Senator METZENBAUM. And frankly, he says, "I don't have the time to study. I don't have the time to do my homework."

Mr. COLEMAN. I do not want to come in here and make any statement for which I cannot refer you to a document and a page. For every statement I have made, I have submitted a document and given you a specific page. You may disagree with what is on that page. And I just feel that I have to prepare before testifying. There have been a lot of documents. As to Mr. Unger's tax problems, Mr. Unger told me something completely different from the information disclosed by Senator Metzenbaum. I now want to go back and check that against the new documents. Then I can tell you why I don't think that a lawyer who makes a total of $80,000 a year can honestly say that he forgot $40,000 of it when he filed his tax returns. I just don't think that he can say anything which will demonstrate that that is a truthful statement. Mr Unger came in here and said he had received a $40,000 fee. Two days later, he said something else. So I do think that since you, Mr. Chairman, are trying to protect Mr. Unger's interests, should lay it all out for.

Senator HATCH. I want to protect you, too.

Mr. UNGER. May I have a rebuttal, Mr. Chairman?

Senator HATCH. Sure. I am just trying to resolve it.

Mr. UNGER. Is Mr. Coleman testifying now? Maybe we could go forward this evening.

Senator HATCH. Well, he is stating, Mr. Unger, that he could not be prepared to go ahead Friday, because he does not have the documents and does not have the transcript. This will be one of the few instances where we have waited to get the transcript when people have sat throughout the entire hearing and taken notes. On the other hand, it has been complex. I think your testimony has rebutted the information today. On the other hand, I am not going to make this decision by myself, and I think under the circumstances we probably could take the testimony Friday. But I want to accommodate Mr. Coleman. We have up until now—although I think it is highly unusual—had rebuttal right from the audience on these occasions.

So I want to be fair to you. I think it has been terrible what you have gone through this last year. I would not want to go through it. On the other hand, the issues that have been raised have been significant issues. Thus far, I think they are rebutted. When Mr. Coleman has his opportunity, maybe he can show where what you told him is different from what are the facts today.

It also is clear on this tax matter that last week, you did not have the information that you have today. I think for somebody to hold you to information 12 years old off the top of your head, when you can testify from documents today, would be, I think, highly improper.

One thing I do not want to happen in here is to see every ambiguity resolved against you. I think if there are ambiguities, you deserve the benefit of the doubt, and I think decent people will give that to you. But let's make sure everybody has an opportunity to resolve these ambiguities if they exist. I think you have resolved a number of them today, but let's wait and see what is testified to in the future.

One last thing. I would recommend to all witnesses, that this is not an adversarial proceeding. This is not a trial. I do not think there is any reason for advocacy here. I think we ought to tell the facts as we know them. I think that is what the ABA should do and let the committee make the determination. If the committee decides to support you, Mr. Unger, which as of right now, I hope it will do, fine. If the committee decides not to support you because of additional testimony or because somebody thinks that your answers are not sufficient, then that is the way the committee will function.

I just want to be fair to Mr. Unger, the bar association, the taxpayers, and I want to be fair to the attorneys and clients who are going to have to try cases in all of the courts of this land.

But I also think that you have been subject to a lot of nitpicking and an awful lot of demand.

And I might add that Mr. Coleman has rightly demanded documents, to which you have been denied, before he will testify again. I think it is time to bring this to a conclusion in fairness to you, one way or the other. And I intend to do that. As far as witnesses are concerned, it will be just you tomorrow. If you feel that you would prefer to wait until after Mr. Coleman testifies, we will be happy to put it off until the first available date after we get back.

Mr. UNGER. I would prefer to conclude my testimony tomorrow, and I believe, if Mr. Coleman has a rebuttal, one would be appropriate for me.

Mr. HATCH. Well, you would be right after his statement.

Mr. UNGER. If there are other questions that anybody has to pose to me, I would prefer to conclude those tomorrow, if I can. I would like to close out that part of the testimony.

Senator HATCH. All right, then, we will accommodate your request. I do not know of any other witnesses. If there are any, they are going to have themselves known to the committee. As of right now, however, there will be two remaining witnesses; you, tomorrow, and then, Mr. Coleman, we will accommodate you right after the recess.

In the meantime, I am directing staff to get Mr. Coleman a transcript of these proceedings up through tomorrow and to get him copies of all of the exhibits and documents that have been introduced in this matter. I would also direct staff to make sure that Mr. Unger has the same materials and that the materials are given to each Senator on this committee who requests it.

Now, my hope is that the first day or so we should put this to bed as far as the testimony. Then, it will have to be scheduled for deliberations by the Judiciary Committee.

I would also suggest that my fellow Senators ought to be on notice that this is an important matter, and they are going to have to adjust their schedules accordingly. I am adjusting mine; they ought to adjust theirs. And you are going to have to adjust yours, and Mr. Coleman, we are going to try to accommodate you, but it is going to be the first day or the second day when we come back.

Mr. **COLEMAN**. What date would that be?

Senator **HATCH**. We come back on the 17th, so it would be the 17th or 18th, or as close thereto as we can. The committee will set the date, and we will all live by it.

Mr. **COLEMAN**. If staff gives me all the materials—all the exhibits and all the testimony—by Tuesday——

Senator **HATCH**. Do you mean next Monday?

Mr. **COLEMAN**. That is the 11th, isn't it?

Senator **HATCH**. I don't think they are going to be able to do that. I will have them work that out with you.

Mr. **COLEMAN**. I am saying that I think I owe it to Mr. Unger to give him my prepared testimony at least 2 days before he has to come in here——

Senator **HATCH**. OK, that would be good. We will try and accommodate you as quickly as we can. And I also think that you ought to make available to Mr. Unger any documents upon which your concluding testimony will be based.

Mr. **COLEMAN**. If I have 5 days to prepare after I get the materials, I will undertake to provide Mr. Unger with my written testimony, and any exhibits and I will give them to Mr. Unger 2 days before the hearing so that he can see them——

Senator **HATCH**. I would suggest you look at it through Mr. Unger's eyes as well as through the bar association's eyes. I think some of the testimony is incredible, and I think some of it is somewhat nitpicking. Now, there are a couple of points that are extremely important. I am just saying that when we have ambiguities that some consideration will be given to resolving them in favor of what some people have indicated is the accused here.

So, let's at least—and I know you will—be as fair as you can under the circumstances.

With that, we will recess until tomorrow at 2 o'clock, when we will take additional testimony from Mr. Unger, and then we will recess until we reschedule this right after the recess.

[Whereupon, at 7:23 p.m., the proceedings were adjourned, to reconvene Thursday, October 6, 1983, at 2 p.m.]

NOMINATION OF SHERMAN E. UNGER

THURSDAY, OCTOBER 6, 1983

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to recess, at 2:04 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin Hatch (acting chairman of the committee), presiding.

Also present: Senator Specter.

Staff present: Duke Short, chief investigator; Joseph Kopka, investigator; Roy Meyers, press secretary; and Stephen Johnson, counsel, Subcommittee on Juvenile Justice.

Senator **Hatch**. Ladies and gentlemen, this marks the fourth day of hearings by the Committee on the Judiciary on the nomination of Mr. Sherman E. Unger to be a U.S. Circuit Court Judge for the Federal Circuit.

We have heard a great deal of testimony on this nomination, both in support of and in opposition to Mr. Unger. Today, we will hear exclusively from Mr. Unger himself. Although there have been several additional allegations, it is my judgment that the case against Mr. Unger is continued in three very important issues. There will be no effort made to prevent any Senator from pursuing his inquiries of Mr. Unger on any matter. However, I will initiate the focus of the discussion today on what I consider to be the three issues.

I feel that many of the accusations have been nitpicking and technical, if not overreaching in nature. The three issues that need to be addressed—although I do believe Mr. Unger has addressed all three in a satisfactory manner, are; first, the question of Justice Moore's allegations yesterday, that you falsely signed an affidavit relating to a potential conflict of interest.

Second, the matter of Mr. Unger's tax problem.

And finally, there will be the question of alleged wrongdoings by Mr. Unger in regard to ex parte communications with the bankruptcy judge. Knowing a little about bankruptcy and how the law was practiced prior to 1978, and knowing how judges summon you to their chambers, I do not know of any attorney who, once summoned by a judge to the chambers, will not go. As a former practicing trial lawyer, whenever a judge called, or his secretary called and said, "We want you over here," I went over. I dropped whatever I was doing. And I think most trial lawyers do that. And in substantive litigation, if ever the question arose concerning the substance of the litigation and the other counsel was not there, I would generally say to the judge, "Don't you think we should ask

Mr. Such-and-Such to come over, as well?" But in bankruptcy litigation, it was a common practice because of the technicalities of bankruptcy that the procedures of administration of bankruptcy for judges to talk to either side any time they wanted to. And frankly, you have very little concern about bankruptcy judges showing the ex parte partiality that can occur in hard-fought civil and criminal trials.

So I felt Mr. Aug's testimony was extremely important on that issue, because he made it clear that this was Judge Gartner's practice, and that you in your first case were not going to irritate Judge Gartner and you made that clear, that you were not intending to, and you certainly were not intending to take advantage of other counsel.

But be that as it may, those are the three issues that I see that anybody could still raise if they wanted to. I feel personally that you have answered those three. However, perhaps we can get into them a little more today. Please feel free to respond to any of the others. The fact that 6 years after it allegedly happened, somebody accused you of saying that you were going to commit suicide if you lost this particular job, I think that borders on the ridiculous to inane. And even if it did happen, so what? Does that mean that you are in that state of mind today?

Second, as far as the accusations that you as a trial lawyer may have been intemperate and abusive, my gosh, I have seen some of the greatest trial lawyers in this country, and I have tried against them. At the time they may have seemed a little intemperate and abusive to me, but they were trying their case and doing their job. So those kinds of allegations bother me a lot. I think the one affidavit was adequately explained. You were just signing documents that Mr. Aug gave you. You admitted that it was an error, but in 30 years of law practice, if those are all the errors you have made, you have done very well for yourself. I am sure every other attorney has made errors, not wanting to, certainly inadvertently, and certainly not by volition, but it does happen.

Mr. Unger, do you care to make an opening statement, or could I ask you some questions right off?

Mr. UNGER. I would just make one short opening statement, if I may, Senator.

FURTHER TESTIMONY OF SHERMAN E. UNGER

Mr. UNGER. In the last year, I have been under the most intense scrutiny that I could imagine possible for any particular prospective nominee. I have dug through ancient files, 10, 12, 15 years old, when I could find them. I have tried to meet allegations that were made by the ABA, and a lot of allegations were made that I dug and found pieces of paper and records and tried to establish a paper trail a decade old or older, and have done that, and they have fallen along the wayside, and new ones come up, and they have fallen along the wayside. I have dug and tried to recreate my life, if you will, for the last 15, 20, 25 years, with pieces of paper. And I have not always been able to keep this sequentially in mind, but I have done my very best, and I am open and responsive, and I will try to respond to any question anyone has, and I will try to dig still deeper, if there is anywhere that I can dig, if anybody wants anything more of me.

I believe I have been an honest man. I think I have been a successful trial lawyer. I think I have fought hard for my clients. I think I have served my country well in the government as a lawyer, and I think that I have not been perfect. I have made mistakes. But I have not intentionally made mistakes, nor have I done any willful wrongdoing, and I would be pleased to respond to your questions.

Senator HATCH. I think that is a very good statement. Whoever the lawyer is, whether it is any lawyer on this panel—Senator Metzenbaum, Senator Specter, or myself—I think they would be hard-pressed to say they never made any mistakes in the practice of law. It is a complex thing. You are always under pressure and under stress, especially trial lawyers. So I appreciate your testimony, and I appreciate you stating that.

One of the things that really has bothered me about these hearings is that there should not be advocacy against you, except by those who know you personally and can cite instances that would lead them to believe that you would not be a competent or an otherwise effective judge.

I believe that these remaining three issues have bothered some of our colleagues and I would like to get as much detail as we can on them. If you care to remark on the other issues, which I feel are not only less important but overreaching, I would be happy to have you do so.

Justice Moore testified yesterday that you filed a false affidavit relating to your knowledge of a conflict of interest between an attorney, Mr. Elzufon, and his client, Unit, Inc. This is, as you know, an extremely serious allegation, and it has been made by a sitting Supreme Court Judge from the State of Delaware.

Have you had the opportunity to review this statement and the accompanying documents since last night?

Mr. UNGER. Yes, sir. I got them this morning; I did, and I would like to respond to them.

Senator HATCH. Have you had a chance to review the letter that I requested from Justice Moore?

Mr. UNGER. Yes, I did.

Senator HATCH. I understand you waived any privilege that might exist with regard to that letter.

Mr. UNGER. And I would refer the committee to that letter, dated February 23, 1978, to——

Senator HATCH. Now, this is a nine page letter dated February 23, 1978, to Sherman E. Unger from Andrew G.T. Moore, II?

Mr. UNGER. Yes, sir. And it will indicate the intensity of the litigation that was going on in Wilmington. It refers to conduct of Mr. Paul Welch, who testified against me on the first day. And the reason it was not in the regular FREIDCO file will be apparent from the content of the letter.

Senator HATCH. OK, go ahead.

Mr. UNGER. In that letter, Mr. Moore at page 8 refers me to local counsel and suggests that John Elzufon, who had worked for him, now worked for the lawyer he had recommended to me.

Senator HATCH. That is on the next-to-the-last page.

Mr. UNGER. Yes, sir. It is in the bottom paragraph of page 8. That letter was a letter I thought about a long time on whether I wanted to institute a separate cause of action in Wilmington, or just go ahead and pursue the interests of my clients. But what I did with that letter was not put it in the trial file; I put it in my personal file, and I locked it.

Senator HATCH. So in other words, you keep a trial file that was in the general files of your office at that time.

Mr. UNGER. Yes, sir.

Senator HATCH. Anybody could go to that trial file.

Mr. UNGER. Yes, sir, anybody in the office.

Senator HATCH. Anybody who wanted to know what the status of that file was could look at the correspondence file, the pleadings file, and certain other evidentiary matters within that file.

Mr. UNGER. Right.

Senator HATCH. And you took this letter, because of the nature of its characterization of Mr. Welch?

Mr. UNGER. Yes, sir.

Senator HATCH [continuing]. And you felt it did not belong in this file and put it in your own personal files and locked them up?

Mr. UNGER. Yes, sir. Unless I decided to take some personal action against Mr. Welch, I thought that this was private correspondence between Drew Moore and myself.

Senator HATCH. How long ago was that?

Mr. UNGER. Well, I suppose I got it within a couple days of him having written it, so it would be——

Senator HATCH. About 5 years ago?

Mr. UNGER. Yes.

Senator HATCH. Almost 6 years ago.

Mr. UNGER. Yes, sir.

Now, the affidavit that Mr. Moore refers to, when I signed it, I believed it to be true. We had gone through the trial file. What happened is my client, Mr. Morris, at Unit, Inc. ran into Mr. Elzufon at a deposition of Mr. Morris, and he was livid. He remembered that he had worked on briefs earlier for our side. He was very unhappy—that is probably an understatement. He wanted something done. I had no recollection of this February 23 letter. I went through my whole file on it, and I was getting ready to leave the country. When I signed that affidavit, I believe that I did not know, either directly or indirectly, that Mr. Elzufon worked for Mr. Tybout.

Senator HATCH. You are saying to us today that you had put that into your private files and had put that away.

Mr. UNGER. I put it away, and the affidavit was signed some 2 years later.

Senator HATCH. And you are saying that 2 years later, you signed an affidavit which you believed at that time to be true——

Mr. UNGER. That is correct.

Senator HATCH [continuing]. But, as a result of this matter here, or as a result of subsequent events, you found out it was not true.

Mr. UNGER. That is correct.

Senator HATCH. Is it also correct that you tried to do everything in your power to set that right?

Mr. **Unger**. Yes. I will tell you exactly what happened. I was out of the country. Mr. Kohn was contacted by Mr. Moore, and Mr. Moore also wrote me a letter that Mr. Kohn got, but Mr. Kohn contacted me and said, "Drew Moore said he wrote you a letter February 23, 1978 in which he mentioned Mr. Elzufon was with Mr. Tybout." I said, "Go through the file again. I did not see anything like that."

He went through the file again. We talked. I said, "I know what letter it is now, and I remember what it is about, and Drew Moore is correct." And I instructed Mr. Kohn to tell Mr. Moore that he was correct. And Mr. Moore's affidavit indicates that he was, in fact, advised by Mr. Kohn that it was correct, he had advised me on February 23, 1978, though it was on a peripheral or a different matter, of that relationship, and I asked that the court be advised of that, and the affidavit be corrected accordingly.

Now, with the advantage of hindsight, probably I should have said just withdraw the affidavit. But certainly, what is said in Mr. Moore's affidavit in paragraph 11 is accurate. I asked that it be straightened out and the court be advised. At no time did I change my position on that. At no time did I reverse my position. Mr. Moore was correct. He was advised he was correct. The issue that really, as I understand it, he presented was that the findings, after oral argument by Mr. Kohn, say something slightly less than he was advised in his affidavit.

Mr. Moore withdrew from that case not because of my affidavit, but because we went ahead with the motion itself. My client specifically insisted that we go ahead with the motion. My client——

Senator **Hatch**. Was he angry with you at that time?

Mr. **Unger**. My client was not very pleased with me. He said he was not advised, he nor any of his employees were advised of that relationship.

Senator **Hatch**. Did Mr. Moore withdraw from the case because he was irritated with you?

Mr. **Unger**. I do not know. I did not talk to Mr. Moore. I was out of the country. I did not attend the oral argument. I did not make the oral argument. I have not been back in Wilmington since then. I did not try the case. I was a little embarrassed with my client.

Senator **Hatch**. It seems like a very adequate explanation. Did you explain this to Mr. Moore at the time?

Mr. **Unger**. I did not talk to Mr. Moore, and Mr. Moore did not talk to me.

Senator **Hatch**. So he did not even know your explanation as to what happened here. He just assumed that you had that letter, therefore you were on notice, and you should have remembered it.

Mr. **Unger**. No, sir. He knew—Michael Kohn told him that I agreed with him, and he put it in his affidavit that I agreed with him, and I did agree with him. He was correct.

Senator **Hatch**. So, are you saying that Justice Moore testified correctly yesterday—with regard to the facts concerning the affidavit?

Mr. **Unger**. Except that it was corrected, yes.

Senator **Hatch**. And he did not know what your feelings were at the time. He did not know why you had that mistake, or of your efforts to correct the mistake.

Mr. UNGER. No. I feel that I lost a good friend because of the motion. When one reads the affidavit, he says he is withdrawing because we are going forward with the application, not my affidavit.

Senator HATCH. It was not the affidavit; it was the going forward with the motion.

Mr. UNGER. That is correct. And my client was very unhappy with my not having informed him that I knew about the relationship. And I somehow did not connect the earlier letter with the subsequent relationship.

Senator HATCH. I do not mean to impose my own experience with trial work upon you. But I would like to see how close your situation was to what we had to do. When I practiced law in Pittsburgh, I was a partner in one of the oldest law firms there. Each partner handled between 100 and 200 trial cases a year. That number was reduced with the more senior partners, but even senior partners had a pretty good number of cases that they were handling simultaneously, up to 200 at any one time. That was an awful lot of cases, and most trial firms would probably have less than that. We lived by what documents were really in those case files.

Is that quite similar to your practice?

Mr. UNGER. Yes, sir. I did not have that many cases at any one time, but——

Senator HATCH. It was pretty impossible to keep every fact in every one of those cases in mind while we were handling all those cases. We might not look at one of those cases except once or twice a month. Some of them would be worked on on a daily basis, but while you would still be working on others. And then, sometimes, you would be in court. Work on a case took a continual process of review, right up to trial. And with the trial lawyers, I know, the ultimate preparation was right before trial. You continually worked on it, you continually prepared, you continually met the pleading standards, you continually did your depositions, you did your interrogatories, you worked on every aspect of the case. But some times you knew more about the case than at other times.

Was that pretty much what you had?

Mr. UNGER. That is exactly right, except this particular case, Senator, had already been turned over to Michael Kohn. He was actually the chief trial counsel.

Senator HATCH. Then you had turned this case over to an associate in your firm.

Mr. UNGER. That is correct.

Senator HATCH. So it was more out of your mind from the standpoint of knowing all the details and remembering every detail of the case than those that you were directly working on.

Mr. UNGER. Senator, the only detail I did not remember was in the February 23 letter. When I signed that affidavit, I believed it to be true. When the February 23 letter was recalled to me, I asked Mr. Kohn to correct my affidavit to advise Mr. Moore he was correct.

Senator HATCH. OK, now, here is what I am getting to. I would review those files, we called it "tickling the file." I would review most of them on a periodic and regular basis. I would go completely through that file, and I would know the facts. But I can see what happened. If I had taken a document out of the file that I did not consider really related to the file and put it in a private file that I really do not tickle on a regular basis, depending upon the case, I would look at that file and the documents within that file and would not particularly remember the document that was not related to it.

Is that what you are saying here?

Mr. Unger. That is exactly what I am saying. I had forgotten about the February 23 letter when I signed the affidavit. When it was called to my attention, I corrected the affidavit. What I think Justice Moore is saying is that the finding of fact based on oral argument was not as broad as the statement that I had authorized Mr. Moore to put in his affidavit.

That oral argument was made by Michael Kohn, but he got no instruction to reverse any position.

Senator Hatch. I think, if I am taking the inferences properly, you are saying even more than that. You are saying that here was a letter that you did not consider a part of the file because it——

Mr. Unger. It was never in the file.

Senator Hatch [continuing]. Basically attacked Mr. Welch. You did not associate it with the file. You put it in your personal files. It did not really click your mind that it was part of that file. And it is an eight-page, single-spaced letter.

Mr. Unger. Yes, sir.

Senator Hatch. And there is only one reference to this representation that Mr. Moore referred to yesterday in this nine-page letter; is that right?

Mr. Unger. That is correct.

Senator Hatch. And that reference is on the next-to-the-last page; is that right?

Mr. Unger. That is correct.

Senator Hatch. And the whole letter refers to matters that are completely outside the realm of the one that Mr. Moore has complained about here.

Mr. Unger. That is correct.

Senator Hatch. Now, had you been able to make this explanation to him at the time, the explanation that you did everything you could to correct the error——

Mr. Unger. I sure had Mr. Kohn call him on January 31 and advise him that he was correct, and I was wrong, and that I wanted the court advised of that. I could have done it better. I guess I could have said, "Withdraw the affidavit." Detached reflection and hindsight is wonderful, and I think that would have been better, but at the telephone conversation, I agreed Mr. Moore was right, and I wanted it straightened out.

Senator Hatch. According to Justice Moore, Mr. Kohn first advised him that you would correct your affidavit. My question is, why didn't you file an amended or corrected affidavit after you learned that the affidavit was untrue?

Mr. Unger. I think I—I don't think I advised him—if I understand the question, I did not tell Mr. Moore that I would correct the affidavit. I asked that the affidavit be corrected in open court, just to say that I——

Senator Hatch. Is that what you did?

Mr. UNGER. I did not go. Mr. Kohn went to court.

Senator HATCH. Mr. Kohn, can you comment on this?

Mr. KOHN. I have not been sworn yet, Senator.

Senator HATCH. I know. I will swear you in.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. KOHN. I do.

TESTIMONY OF MICHAEL KOHN

Senator HATCH. Tell us what Mr. Unger asked you to do with regard to this affidavit, and tell us what you did.

Mr. KOHN. To the best of my recollection, Senator, I did in a telephone conversation with Mr. Moore what Mr. Moore reflects in his affidavit. I learned that Mr. Moore, because we intended to press forward with the motion because our client had insisted, that Mr. Moore intended to withdraw from the case. Mr. Moore in fact prepared a Notice of Motion, Motion, and his affidavit, and presented them to the court for withdrawal from representation of our client in that case. I do not recall whether Mr. Moore presented that motion before we argued the disqualification motion or whether it was after, but I believe that that was heard on February 4, 1980, or during that week, but I believe it was on Monday, February 4, 1980.

I believe my only response to the disqualification motion was merely a response that our client was being left, 1 week before trial, without local counsel, and that we obviously were being put in a very, very difficult situation.

I do not recall the entire colloquy with respect to the motion to disqualify, because we argued it preserving what we thought was the only issue available to us, which was the waiver issue.

I argued the motion. I argued it the way, at that time, I believed it should be argued. The court ruled against us on February 8, I believe, and we went to trial the morning of February 11.

Senator HATCH. Senator Specter, do you have any questions on this issue?

Senator SPECTER. Yes, Mr. Chairman.

Senator HATCH. Well, then, I will run over and vote and you can continue. Then, you can vote, and if you have not finished, we will wait until you get back to finish.

[Whereupon, Senator Specter assumed the chair.]

Senator SPECTER. Mr. Unger, on the issue of Justice Moore's testimony and the letter which Justice Moore testified that he sent to you, have you now had an opportunity to examine this letter?

Mr. UNGER. Yes, sir.

Senator SPECTER. Does this letter contradict the facts set forth in your own affidavit?

Mr. UNGER. Yes, sir.

Senator SPECTER. And your testimony is that you never saw this letter?

Mr. UNGER. No, sir, that is not my testimony.

Senator SPECTER. What is your testimony?

Mr. UNGER. My testimony is that I got this letter on or about February 23, 1978. It dealt with a matter other than the FREIDCO trial, as the Senator can see. It dealt with something that I thought was sensitive in nature, and it was something I wanted to personally think about whether I wanted to involve myself in another piece of litigation with Mr. Welch. I put it in my personal files, not in the trial file. I gave it a great deal of thought when I got it, and then I put it away.

When I signed the affidavit to disqualify, I had checked our trial file, and I really believed what I signed in the affidavit to be true.

When Mr. Kohn talked to Mr. Moore, and Mr. Moore referred him to this letter, which was outside of the trial file, I recognized that what Mr. Moore said was correct. And I told Mr. Kohn to advise Mr. Moore of that fact—Mr. Kohn was arguing the motion, Mr. Kohn was going to try the case—and asked him to straighten it out, to advise the court and correct it with the court.

Senator SPECTER. You asked Mr. Kohn to do what with Mr. Moore?

Mr. UNGER. To do exactly what Mr. Moore says in paragraph 11 of his affidavit, Mr. Kohn did, which was to tell him that when he reached me and reminded me of that letter, I remembered it; he was correct, that reference was in the letter, and my affidavit was in error.

Senator SPECTER. Well, when did you find out your affidavit was in error?

Mr. UNGER. I think, January 30 or 31, or whatever day I—I was out of the country—whatever day Mr. Kohn reached me and reminded me of Mr. Moore's reference to the letter.

Senator SPECTER. January 30 or 31 of what year?

Mr. UNGER. 1980, 2 years later.

Senator SPECTER. And what action did you take with respect to the affidavit which you then knew to be false?

Mr. UNGER. He advised Mr. Moore. He went to Wilmington. He told the court that Mr. Moore was correct. He did not state it, apparently, when you look at the finding of fact, as openly as it might have been done, but I certainly did not reverse my instruction to say that Mr. Moore was correct.

Senator SPECTER. You just said you asked Mr. Moore to do it. You mean you asked Mr. Kohn to do it.

Mr. UNGER. I advised Mr. Moore, and Mr. Moore put it in the affidavit withdrawing, as well.

Senator SPECTER. In what way did you advise Mr. Moore?

Mr. UNGER. May I read from Mr. Moore's affidavit? It is one paragraph.

[Pause.]

Senator, maybe we have a spare copy, if you are still looking for it.

[Mr. Kohn handing document to staff.]

Senator SPECTER. Mr. Unger, those bells that are now going off mean that we have 7½ minutes to vote, so I am going to have to go to vote at this time. In the meantime, we will find the affidavit——

Mr. UNGER. We have just given you a spare copy.

Senator SPECTER. I know, and I will return, and we will take it up then.

[Short recess.]

Senator Hatch. If we could have order. Mr. Unger, Senator Specter is being detained just for a few minutes. As soon as he comes back in, we will turn the time over to him to pursue his line of questioning, because I do not think he has finished.

But in the meantime, let me go to the second of the three allegations that you should spend time on today. However, I am not foreclosing you from spending time on any other allegations.

The second major allegation relates to your failure to declare approximately $40,000 in income on your 1968 tax returns. You have explained that. But some have alleged that the magnitude of this obligation makes it extremely difficult to comprehend how an honest error could have occurred with respect to the $40,000 amount.

Would you be kind enough to give us what you think is the explanation on this?

Mr. Unger. Yes, sir. The magnitude makes it difficult for me to understand also, except it was not something that had come through my normal law practice. Thirty thousand dollars of it had gone back into stock. I do not know how I missed it. We are talking about one specific night, the night of April 15, 1969. We are talking about an investigation that was conducted by the Internal Revenue Service, by the Internal Revenue Service Intelligence Division. We are talking about something where the Internal Revenue Service was totally satisfied there was no willfulness, there was no wrongful intent. I do not know how I missed it, but I certainly, when I found it, turned myself—advised the Treasury Department of it, and I had an amended return filed. The Internal Revenue Service, after extensive investigation, concluded a negligence penalty was appropriate. There was no way that a man of my means could hide $40,000 of income. There is no way that I would want to do that. You can take a look at my tax records from whenever you want to. I generally pay my taxes—I pay a lot of taxes. I do not try to shelter them. And I had no intention of doing anything wrong. And the Internal Revenue Service found that. There was no willfulness, there was no civil fraud penalty applied. There was no fraud involved in the Internal Revenue Service investigation. When we got down to it, they accepted the fact that it was an honest error, and I was negligent, I missed it. I cannot tell you how I missed it, Senator. If I knew how I missed it, I would have put it in there.

Senator Hatch. As I understand it, there were no criminal sanctions with regard to this?

Mr. Unger. There never were criminal sanctions, there were no civil fraud sanctions.

Senator Hatch. You paid the taxes immediately upon looking at your basis and finding out that they were owed.

Mr. Unger. As soon as I was able to get the amended return put together, yes, sir.

Senator Hatch. I take it that although this was investigated by the Intelligence Division of the IRS that they—according to the information we had yesterday, and according to your testimony—were satisfied that there was no criminal cause of action?

Mr. Unger. That is correct.

Senator Hatch. So there was neither a criminal cause of action nor a civil cause of action, in their eyes?

Mr. Unger. That is correct, and I paid it even though I had advice of tax counsel that I could make a reasonable argument that it was a nontaxable event.

Senator Hatch. Am I right in my recollection that one of your tax counsels thought you could fight that?

Mr. Unger. That is correct. That is the letter from Silverstein and Mullens.

Senator Hatch. What was your total income for that year?

Mr. Unger. With the $40,000?

Senator Hatch. With the $40,000.

Mr. Unger. It was 100-and-some thousand dollars.

Senator Hatch. So without the $40,000, it would have been below $100,000?

Mr. Unger. Yes, sir.

Senator Hatch. But it still would have been a significant income for—what year was that?

Mr. Unger. 1968.

Senator Hatch. 1968. As I understand it, you have paid more than 50 percent of your total income in taxes over the last 5 years.

Mr. Unger. Over the last 6 years, of my net taxable income, I have paid more than half of it to the Internal Revenue Service. That is just the U.S . tax, not counting the other State taxes.

Senator Hatch. Well, I think it comes back to my basic question, that you made a little over $100,000. Do you know how much over $100,000 you made that year?

Mr. Unger. I can look it up. It was not substantially over. [Perusing documents.] It would be in the amended return. The amended return shows a gross income of $101,330.

Senator Hatch. Including the $40,000?

Mr. Unger. Yes.

Senator Hatch. So you would have had, then, a gross income of about $61,000?

Mr. Unger. When I did my return, I showed gross income of $64,269.

Senator Hatch. I see.

So what you are saying to this committee is that you made a mistake. According to one tax counsel, there was a question of whether or not it really was a mistake, that you owed the taxes on this money. Then you decided to amend your return and pay taxes on it, rather than take any chances that it be construed as a nonmistake?

Mr. Unger. Yes, Senator. It was an honest mistake. The Internal Revenue Service saw it as that. It happened 12, 15 years ago. I have filed a lot of tax returns and paid a lot of taxes since then. I have never had a reason to take another issue, even to the appellate division. And if I could explain it, I would not have done it. I do not know how I missed it. I was in a hurry. I did my return in the normal way. This was a transaction that was unusual for me, and it somehow slipped my mind.

There was no intent and absolutely no way that a man of my means could take $40,000 and not pay tax on it.

Senator Hatch. Just to button it down, did the IRS ever bring either a criminal or a civil action against you?

Mr. Unger. No, sir.

Senator HATCH. So as far as you know, they were satisfied that everything was proper in the end?

Mr. UNGER. I know that they were satisfied. I know that reached settlement, to pay the extra $3,000. And the matter was put behind me in December of 1971.

It was an unfortunate incident, but there was certainly no wrongful or willful intent.

Senator HATCH. I think the final and only remaining major allegation relates to your ex parte communication with Judge Gartner and the nature of your discussions at this particular meeting. I know that you have had to discuss this over and over again. But this is a day when you can put the matter at rest and establish a record on these issues. I would like you to summarize for the committee the precise sequences of events involved in the alleged ex parte meeting, as well as what was said at the meeting or meetings. If you would also please explain why you think the ABA is wrong in its opinion that that should not have occurred.

Mr. UNGER. Senator, this all started when a bankruptcy judge in Wilmington, Delaware ruled against my client, Unit, Inc., in the FREIDCO matter and held that Unit, Inc. had done certain things that, in that judge's opinion, were improper, and a trustee was appointed.

Counsel opposing me in the Unit, Inc. Chapter 11 proceeding provided on an ex parte basis a copy of that opinion, which was a negative opinion, as far as my client was concerned, to Judge Gartner, the bankruptcy judge in Cincinnati.

I presume the intent of going outside of the record and giving an opinion in another case that pertained to my client misconduct was to influence the judge negatively so that a trustee could be appointed in the case that I had. The judge, once he got the opinion, even though I think it was improperly before him, had his secretary call me and tell me to come over there. And essentially, there were also briefs and other accusations which were involved that indicated that Unit, Inc. may have been an embezzler—there were a lot of strong charges made; some of them, you will see in the earlier letter of February 23, that we talked about.

The judge was very concerned. He wanted to know what was going on in Wilmington, what was happening with the bank building up there, which Unit, Inc. owned 71 percent. Unit, Inc. had been managing it and getting a cash flow.

I would have preferred not to have that order before Judge Gartner. I would have preferred not to discuss the events that were going on in Wilmington with Judge Gartner. I would have preferred—I was doing well in the two Ohio cases and losing virtually everything in the Wilmington case, and while I heard Justice Moore yesterday say that Judge Gartner had the highest respect for me, I would not have taken the calculated risk that Judge Gartner could have turned the other way and appointed a trustee. And until this issue came up, I had no idea what his disposition was. I found out very shortly that he did not think highly of trustees being appointed, but I did not know that at the time. I had never had a case with a trustee issue before him.

So, I was called to his chambers by his secretary, and I went over there, and he grilled me, to use his word, on what was going on in

Wilmington. In the course of that, he started getting out the monthly statements and saw that they were going to lose their management fee. He was a little unhappy about the fact that he thought that 71 percent of that building was really property before him. And essentially, he said, "What am I going to do?"

I said, "There isn't much that you can do, Judge. There was a motion to consolidate a year and a half ago, and you overruled it."

We talked some more, and he asked some more questions, and it became apparent to me that the attempt to influence the judge negatively on my client's conduct had, instead of having that, had gotten him concerned about their finances and whether or not they were going to be able to reorganize under his administration.

So I said, "The only thing I know would be to reconsider that order."

His testimony is that he directed me to file a strong application for reconsideration. Now, the argument between the ABA and myself is that essentially, I should not have been with the judge alone, though at that period of time, bankruptcy judges did have administrative conferences. And the problem is that——

Senator **Hatch**. You are saying they had ex parte——

Mr. **Unger** [continuing]. Ex parte administrative conferences—and it was routine, and I was generally uncomfortable with them, because until I had been in bankruptcy court, I had never had one. The problem becomes when do you tell a judge that, "I think you have gone too far, Judge. I am not going to talk to you anymore. I am going to leave your chamber."

I think my impression of Judge Gartner, and you will see in Mr. Aug's testimony, his impression of Judge Gartner was that he knew where that line was and he, Judge Gartner, would draw it, and he would stop and say, "Maybe we had better get counsel for the other side." And I have seen him do that. In this particular instance, he did not say that. He said, "Go draft a strong application."

And with the advantage of hindsight, and under a microscope and detached reflection, I am sure we got very close to a line that I would rather not have been close to. But we were there, and I did what he told me. I had two major reorganizations before that judge, and I filed a strong application. I did not know at the time what he was going to do with it. He could have set it down for hearing. He could have issued an order. He could have thrown it away.

That is the ex parte communication. I obviously thought it was proper, because I was the man who brought the appeal to the 3d Circuit on the injunction that enjoined Judge Gartner and all counsel and all judges in the Southern District of Ohio from certain actions. I obviously thought I was proper within the Southern District of Ohio when I filed a petition for certiorari in the Supreme Court on the same injunction issue. I did not initiate the conference. I did respond. And it is very difficult, when a judge calls you in, to ignore him.

Senator **Hatch**. That has certainly been my experience. We had Judge Ritter out in Utah, and if he called you in to his chambers, you went, no matter who was there. If you did not, you were held in contempt of court.

Mr. **Unger.** I might add that Judge Gartner felt so strongly about this particular issue that some 2 weeks later, when I was mercifully out of town, and Mr. Kohn also was gone, Judge Gartner issued a sua sponte order on the same subject matter without advising any counsel, or without talking to me, or without having any conferences, and I would like permission to put that sua sponte order in the record, because it will indicate the strength of Judge Gartner's own feelings on this administration.

Senator **Hatch.** Without objection, we will put that in the record.

[The following was received for the record:]

RECEIVED
JUL 27 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF I

UNIT, INC. I Bankruptcy No. B-1-75-1989

Debtor. I

ORDER REQUIRING PETER J. WALSH, ESQ. TO APPEAR AND SHOW CAUSE; SUGGESTING ROBERT E. HICKMAN AND HARRY B. TINGLE DO LIKEWISE AND COMMENTS.

At Cincinnati, in said District, on July 26, 1977:

It is unfortunate, albeit unique, that two courts of para-jurisdiction should find themselves in what appears to be a collision course for justice.

And yet this may not be so, nor is it necessarily so.

On July 14, 1977 this Court entered an order vacating a previous order of January 7, 1976 in which it refused to accept jurisdiction for the administration of the Chapter XII proceeding of Freidco of Wilmington Delaware, Ltd. (hereafter Freidco), all as set forth in said orders.

That July 14, 1977 order was based upon an application by Unit, In Debtor-in-Possession herein, as set forth therein, and with full knowledge of the decision and order of Bankruptcy Judge Balick in Wilmington, Delaware appointing a trustee; in fact, because of that appointment.

It is to be emphasized at this point that the Cincinnati Court has no quarrel with, nor criticism of, the appointment of a trustee in Freidco at Wilmington. Such a matter is strictly the concern of that court.

One casual observation -- Bankruptcy Judge Balick, in her opinion of June 30, 1977 observes at the bottom of page three:

> "Extensive discovery, testimony and hundreds of exhibits presented during five days of hearing have shown that there are numerous charges and counter-charges between and among Unit, Freidco-Wilmington, Farmers and Hickman......"

If the experience of this Court (which is administering several cases in the Unit conglomerate) is any barometer of the experience of Bankruptcy Judge Balick, most of that five day discovery process was bickering among attorneys.

One further observation -- Bankruptcy Judge Balick in her ruling on July 22, 1977 recognizes the power of bankruptcy judges to reconsider orders. She states:

> judges, have the inherent power to reconsider orders."
> Extract of proceedings of July 22, 1977 -- Oral argument and rulings of the Court. pg. A-3.

Since this Court's order of July 14, 1977, additional informati knowledge, has been made available to it, i e. the order of Bankruptcy Judge Balick of July 22, 1977; her partial findings as of that date; the Temporary Restraining Order of District Judge Walter K. Stapleton of July 20, 1977 (vacated); the Order of District Judge Walter K. Stapleton of July 22, 1977; the letter of Peter J. Walsh dated July 19, 1977 to Bell, Moore, Unger and Welsh, Esqs. (copy to Bankruptcy Judge Balick). It is to this last item that this Court should like to turn its attention now. On page 2 of that letter Mr. Walsh observes:

> "As I read Judge Gartner's Order, it does not actually stay in toto my activities as a trustee, although the particualr functions which it does not purport to preclude are not easy to discern."....

This Court certainly understands his confusion and will attempt to clarify it.

Freidco, Ltd. a limited partnership is in a Chapter XII proceeding in the Bankruptcy Court at Wilmington, Delaware and it is the responsibility of that court to administer it -- hopefully to the successful confirmation of a plan of arrangement.

Unit, Inc., a corporation, is in a Chapter XI proceeding in the Bankruptcy Court at Cincinnati, Ohio and it is the responsibility of this Court to administer it -- hopefully to the successful confirmation of a plan of arrangement (overdue in this court at this time by a few days).

Unit, Inc. is a general partner in Freidco as well as in other limited partnerships some of which are in Chapter XII proceedings in this Court and appear to be moving ahead to better days. The combined success of these sundry operations is the ultimate success of Unit, Inc.

Unit, Inc. besides its role as general partner above noted, is managing a building in Wilmington, Delaware known as the Farmers Bank Building and apparently successfully so, at least this Court has received no evidence to the contrary, and as Unit's reports to this Court would reflect (See Twenty-First Report of Debtor In Possession - filed July 20, 1977 - Exhibit A attached).

Article III, Section 311 of the Bankruptcy Act (11 U.S.C 711) provides as follows:

> "Where not inconsistent with the provisions of

> this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

See also the Rules Comment and the tie-in with Rule 11-44 of the Rules of Bankruptcy Procedure, Section (a) of which grants "...a stay of...other proceedings against the debtor,...".

The management arrangement of Unit, Inc for the Farmers Bank Building in Wilmington, Delaware is property of the debtor until this Court can be shown to the contrary. It is a valuable asset to its estate and anyone interfering with that operation is answerable to this Court.

See definition of "Property", Blacks Law Dictionary, 1968 Ed. (Revised 4th).

Peter J. Walsh is ordered to appear in this Court on Thursday, August 11, 1977 at 10:00 A.M. in Room 721, Courtroom No. 2, United States Post Office and Court House 5th & Walnut Streets, Cincinnati, Ohio, to show cause in line with the foregoing comments.

This Court likewise suggests that Messers Robert E. Hickman and Harry B. Tingle appear at the same time to show what unlawful acts were alleged to have been committed by Messers Aug, Unger and Kohn to justify their appearing before District Judge Walter K. Stapleton to obtain a Restraining Order. These gentlemen are, in their capacity as attorneys in these proceedings, officers of this Court. See order of District Judge Walter K. Stapleton of July 20, 1977 (vacated). This Court is intently interested in the conduct of its officers.

IT IS SO ORDERED.

Bankruptcy Judge

ENTERED
JUL 26 1977

FILED

JUL 20 1977

LEONARD C. GARDNER
RAYMOND J. PELLMAN
BANKRUPTCY JUDGES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF :
UNIT, INC., :
Debtor :

No. B 1-75-1989
In Proceedings for an Arrangement

TWENTY-FIRST REPORT OF DEBTOR
IN POSSESSION

DOCKETED

Unit, Inc., debtor in possession in the within proceedings, hereby submits its Twenty-First Report of Debtor in Possession, the same being attached hereto and marked Exhibit A.

UNIT, INC.

By
B. W. Morris,
General Partner

INCOME AND DISBURSEMENTS
JUNE 1977

Exhibit A

DATE	1977	CK#	DR.	CR.	Dallas International Bank
JUNE					
5/31	Beginning Balance		650.14		
6/1	U. S. Postmaster	1595		50.00	Postage
6/3	Deposit		2,500.00		Management Fee
6/7	Deposit		74.07		Empl. Ins. Reimbursement(
6/7	Deposit		4,000.00		Management Fee (Main Towe
6/6	James Mayer	1596		200.00	Fee/Mgmt. (Hillcrest #II)
6/6	B. W. Morris	1597		100.00	Advance
6/7	ADS Postalia	1598		58.28	Postage
6/7	American Express	1599		1,199.35	Travel
6/7	Aetna Life & Casualty	1600		734.03	Employers Ins.
6/7	Bankers Club	1601		124.35	Travel
6/7	Bell Telephone	1602		827.00	Telephone
6/7	Braniff International	1603		970.12	Travel
6/7	Cincinnati Bell	1604		307.50	Telephone
6/7	City Club	1605		64.80	Travel
6/7	Columbia Olds.	1606		198.55	Auto Expense
6/7	Diners Club	1607		101.82	Travel
6/7	Floyd West & Co.	1608		349.90	Insurance
6/7	Olsten Temporary	1609		171.00	Office Expense
6/7	Shell Oil Co.	1610		41.88	Travel
6/7	Xerox Corp.	1611		220.50	Office Expense
6/7	Xerox Corp.	1612		219.45	Office Expense
6/7	Columbia Olds.	1613		96.46	Auto Expense
6/9	Deposit		2,198.28		Management Fee (Cliffs)
6/9	Deposit		1,801.09		Management Fee (Patchen)
6/15	Payroll	1614-1618		3,050.77	Payroll
6/14	Dallas Internatioanl	Bk.1619		1,695.23	Federal Deposit
6/13	Texas State Treas.	1620		125.00	Texas Unempl. Tax
6/14	Deposit		1,831.74		Management Fee(Hillcrest
6/20	Deposit		186.55		Empl. Ins. Reimb.(Cliffs.. Patche

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DATE	1977	CK#	DR.	CR.	Dallas International Bank
6/20	U.S. Postmaster	1621		50.00	Postage
6/22	Hillcrest Square	1622		3,143.40	Hillcrest Mgmt. Fee
6/22	Deposit		3,143.40		Hillcrest Mgmt. Fee Reimb.
6/24	Deposit		105.09		Empl. Ins. Reimb.
6/22	Payroll	1623-1627		3,050.77	Payroll
6/27	Deposit		2,000.00		Management Fee (Cliffs)
6/29	Aetna Life & Cas.	1628		160.17	Empl. Ins.
6/29	Deposit		2,500.00		Management Fee (Freidco)
6/29	Deposit		82.20		Dividend Freidco of LV
,/30	James Mayer	1629		200.00	Fee/Mgmt. Hillcrest #II
6/29	Xerox, Corp.	1630		661.50	Office Expense
	Void	1631			Void
6/29	Shell Oil Co.	1632		41.15	Travel
6/29	Exxon Co.	1633		53.56	Travel
6/29	Cincinnati Bell	1634		451.66	Telephone
6/29	Cincinnati Bell	1635		207.99	Telephone
6/29	Bell Telephone	1636		692.29	Telephone
6/29	Armstrong Coffee	1637		68.14	Office Expense
6/29	Solar Vision Inc.	1638		20.00	Office Expense
6/30	Payroll	1639		235.37	Payroll
			$ 21,072.56	$ 19,931.99	
6/30/77	ENDING BALANCE		$ 1,140.57		

Mr. UNGER. He, in effect, ordered the trustee and certain partners in FREIDCO to appear before him. He did that on his own motion, to the best of my knowledge, without any contact with any lawyer involved in either FREIDCO or Unit. He was concerned—and he expressed that concern, and it is in the sua sponte order, how strongly that concern was to him—about what was happening to his administrative responsibilities. Now, the reason I refer to this is they crossed over, and it is a very difficult line to say, "Judge, you are talking administration now—oh, oh, you are not talking administration now; we had better get the other guys in." It was, in my judgment, something I let the judge set the tenor to.

But I respectfully refer you to the sua sponte order, as well, which no one can suggest I had anything to do with, and it is equally strong.

Senator HATCH. Are there any other allegations that have been made against you that you would care to spend any time on? Or do you care to make any other statements to the committee?

Mr. UNGER. I would like to be able, if Senator Specter is coming back, to respond to his question.

Senator HATCH. Yes. We will reserve that time for Senator Specter, and you and he can discuss the matter further. But is there anything else that you would care to respond to? As I understand it, you have had the allegations about the suicide threat upon departure from American Financial Corporation.

Mr. UNGER. I have denied that constantly since it has been made, sir.

Senator HATCH. I understand.

Second, termination from HUD. We went into this extensively yesterday, including the difference of opinion with HUD superiors and, of course, the pending nomination to the FFC. It was not withdrawn. You voluntarily withdrew because you wanted to resolve these tax problems.

Mr. UNGER. Yes, sir. It was down to the constructive income issue that I wanted to resolve, and I could not get it done in a hurry. As you can see, it took until December of 1971.

Senator HATCH. Third was the allegation that you made a false affidavit regarding your relationship with your client in the bankruptcy proceeding. You admitted that that was in error, but it was unintentional, as I understand it.

Mr. UNGER. That is correct.

Senator HATCH. And as I understand it, no harm came from that unintentional error, from your point of view.

Mr. UNGER. That is correct.

Senator HATCH. Four, we talked about the allegation that you received lawyer's fees of $12,000 prior to final court approval, which was technically improper. As I recall your explanation, it was later approved by the judge in subsequent documents in the court.

Mr. UNGER. That is correct.

Senator HATCH. And that that was ⅛ of 1 percent of the total fee in the case.

Mr. UNGER. That is correct, and there was no intention to mislead anyone. They were part of the court records.

Senator HATCH. Am I correct in my recollection that immediately thereafter, that was approved by the court without any objection by opposing counsel?

Mr. UNGER. The report which included the payment was approved. There was no special order on the payment.

Senator HATCH. Your client was aware of it——

Mr. UNGER. My client was aware of it.

Senator HATCH [continuing]. The other people were aware of it?

Mr. UNGER. Yes, sir. Copies were sent to the primary creditor, and there was never an objection raised in court.

Senator HATCH. OK. ~~And~~ you testified yesterday that you did not believe any harm was done.

Mr. UNGER. I do not believe any harm was done at all, and again, there was no intent to do something wrong. It was a nonbankruptcy charge, and it was technically erroneous, and I admit that.

Senator HATCH. The fifth allegation was that, on occasion, you were abusive and intemperate in court. The ABA has made this allegation, but has not been able to produce any witnesses to testify on this. However, we have had a couple of witnesses who have indicated that you were a very strong advocate.

Mr. UNGER. I probably was a strong advocate. I would refer, again, to some letters and documents you have about the strong advocates that were against me.

Senator HATCH. The sixth allegation was that you improperly contacted opposing parties, but again, no details have been provided.

Mr. UNGER. I have no way of responding to that.

Senator HATCH. And you do not recall any improper contacts?

Mr. UNGER. No.

Senator HATCH. Seventh, was the ex parte contacts, which you have explained here today.

Mr. UNGER. I have explained it, but I am sure there will be more questions. I would like to say something a minute, Senator. I have tried in my 30 years at the bar to be an honorable, strong, fair advocate for my clients. I have not tried to cut any corners. I have not felt the need to cut any corners. I have tried to the best of my ability to act in my profession in an honorable way. I have made some mistakes. I have been put under a microscope for the last year. I would point out that nobody from Cincinnati or Washington, D.C. where I maintain offices has appeared yet to testify against me. We do have people from Wilmington who have appeared to testify against me. But I in no way or at no time intended to do anything wrong or anything that was improper. I have never had a grievance filed against me. I am proud of my record as a lawyer. I have won some large cases. I have had some major settlements. I have held my AV rating in a reasonably small town where, if I was the kind of person that is being described by the ABA, I would not have. I have had some very——

Senator HATCH. Just on that point for the record, I hold the AV rating myself, and I know how difficult it is to get that. It is a rating given by your peers without your knowledge, and it is a confidential rating.

Mr. UNGER. That is correct.

Senator HATCH. I rate a number of people every year for the ABA. I take that as one of the most sacred responsibilities I have, to make sure that I do not rate anybody who does not deserve the highest rating for legal ethics and legal ability. That is what that stands for. And you just don't get that easily.

Mr. UNGER. I recognize that in this 30 years, I have made some mistakes. I have not intended to. They have not been major. They are there. They are part of my living being. It seems that most of the charges against me have some time and aging on them. A lot of them go back 10 or 12 years, and I have tried for the last year to dig through my records to produce and be responsive, and I want to be responsive.

Senator HATCH. I want to get to Senator Specter, But, first, let me ask about the ex parte contacts. Your testimony basically has been that it was not inappropriate during that period of time in bankruptcy proceedings. The call was initiated by Judge Gartner through his secretary, even though he may have forgotten that, and it was focused principally upon procedural matters. You responded and obeyed the judge's request to you.

Mr. UNGER. It was on procedural matters, but Senator Specter asked me whether there was a matter of substance, and when we talked about an application to reconsider, we did not talk about what was going into the application, but we did talk about the application, and that has always been factual.

Senator HATCH. One last question before I leave. Let me return briefly to the tax issue. You stated in your letter of September 30 to Senator Specter that you had no access to your 1968 tax return. Could you explain again from where you have now received access to that return?

Mr. UNGER. Yes, sir. I could not find one. I thought Arthur Andersen kept copies. I found out the day after he asked me for a copy that they had a destruction program after 8 years. So what I did was then call the law firms that had represented me before the IRS on that 1968 tax return. One of them in Cincinnati sent out to their warehouse and recovered my tax file. That is where I got a lot more information than I had before. Actually, I had tried to reconstruct from memory what had happened, and I had not been precise. I found more exact information and the return in their file in the warehouse. And they were good enough to do that overnight for me. I have signed complete waivers for my tax returns during these years, and given it to the Justice Department.

Senator HATCH. For Senator Specter's benefit, I addressed my major inquiries into what I consider to be the three major allegations—the $40,000 unreported income; Justice Moore's testimony yesterday on the affidavit that was in error; and the ex parte communication. So we have covered those rather extensively, and we have not gone into any of the other matters, which I personally feel are probably de minimus, if anything, and technical at best.

But I think I have covered everything I need to cover on this, and probably will not need to cover anything until after Mr. Coleman testifies after the recess.

I just personally want to express my gratitude for my colleagues who have attended these hearings, and Senator Specter, especially, who is here today. I think it shows his tremendous interest in making sure that we have the best people serve on the Federal bench.

I am going to leave, because I have another conflict. I commend you to Senator Specter, because he will ask, I think, a lot of good questions, and hopefully, get this matter resolved even further.

Mr. UNGER. Thank you, Senator.

Senator SPECTER. Mr. Chairman, before you go, I would like to repeat what I have said before in this room, that there is no Senator in this body who works harder than you do, and from your position as chairman of the Constitutional Law Subcommittee, you have undertaken, I think, the most hearings in the most prodigious number of matters, the Voting Rights Act, the civil rights issues, constitutional questions on prayer, and a constitutional amendment on the balanced budget. I could go on and on, but they are just legion in number, and you have taken on the chairmanship of this hearing, as well, at the request of Chairman Thurmond. It is a pleasure to work with you. I have attended as much of these hearings as I possibly could. One thing which is hard for many to understand unless they actually see what goes on here are the extraordinary number of conflicting matters that we have to attend to. I have been meeting with some people in the outer room, because I had a full afternoon of appointments, and have been trying to move back and forth to come back in and participate in these matters to the fullest extent possible. It concerns me, as a professional matter, to ask questions on these matters where it is simply not humanly possible to have the kind of factual background which we would have as practicing lawyers, where we would know the files thoroughly, have all the documents in tow, have questions prepared. If someone were to read this transcript, contrasted with the way a trial lawyer would handle a trial deposition, the marks would not be too high. But most of these documents we are looking at for the first time—and as you notice, I always want the documents, so that I can try to follow what is happening. You cannot tell the players without a scorecard, and you cannot follow a proceeding without the documents.

I enjoy working with you, Mr. Chairman, and I do have some questions, and I will try to be relatively brief.

Senator HATCH. Thank you, Senator Specter. I likewise appreciate both you and Senator Metzenbaum being here, and I appreciate the patience you have had.

I have had some difficulty with this hearing. I felt that Mr. Unger should at least have had the opportunity to have explained his side on that first day. That is why I tried to go as long as I could, so he would have that opportunity. Sometimes you leave these things hanging, and only one side is expressed. You cannot blame the media for expressing only what they hear that particular day in the hearing. But that is why I insisted on trying to get these matters covered yesterday. And that is why I am happy to have had this experience here today. I look forward to the remaining day of hearings and hopefully, we can resolve any additional matters that exist.

Mr. Unger, I appreciate your patience, your forebearance and the dignity with which you have conducted yourself under the circumstances.

So with that, Senator Specter, thank you again, and I turn the witness over to you.

Mr. UNGER. Senator, may I add my thanks to your patience. This has been an extremely long hearing, and I know you have a great number of other obligations, and I sincerely appreciate your interest.

Senator HATCH. Thank you so much.

[Whereupon, Senator Specter assumed the chair.]

Senator SPECTER. Mr. Unger, let me return to my question on the issues which you had discussed in the so-called ex parte hearing with Judge Gartner, and the issue of an order. As I recall your testimony from yesterday, you said that you filed a motion and a memorandum, but not an order.

Mr. UNGER. That is correct.

Senator SPECTER. Judge Gartner refers to a purported order, and I now refer to Tab 11, page 57——

Mr. UNGER. Actually, Senator, if I may interrupt, I did not file it in the sense of giving it to the court register.

Senator SPECTER. You handed it to the judge. I understand that distinction.

Mr. UNGER. Yes.

Senator SPECTER. Do you have those documents?

Mr. UNGER. I have the application and memorandum.

Senator SPECTER. May I see them, please?

Mr. UNGER. [Perusing documents.] Here it is. [Handing document to staff.]

Senator SPECTER. Now, if you can, will you turn to page 57 of the language of the purported order?

Mr. UNGER. I beg your pardon, sir?

Senator SPECTER. Go to Tab 11, page 57, and take a look at Judge Gartner's testimony. It begins at page 56, Mr. Unger, where the question is, "Now, when Mr. Unger gave you those proposed findings in connection with that, was that at your request, or did he volunteer them?"

And the answer by Judge Gartner is: "No, it wasn't at my request. I asked him to bring over a strong application. He brought over a strong application, plus a purported order, which I looked at and didn't like, except for the last part, the educational part of it, in which I asked for briefs to educate the court, to let me know what this is all about. The rest of it, I disregarded."

Now, was there an order or a purported order that you brought over?

Mr. UNGER. May I—I did not bring it over, sir. What happened was he asked me whether I had an order—generally, nobody presented an order to Judge Gartner. He liked to write his own, and you could lose him. He asked me if I had a proposed order. I called Michael Kohn and said, "Do we have a proposed order? Do you have anything in mind? The Judge has asked for an order."

Michael brought over a rough draft of a proposed order on a single piece of paper, I believe. That was presented to the Judge. I did not bring it at the time with the application. There was one brought in.

Senator SPECTER. So when Judge Gartner said, "He brought over a strong application, plus a purported order," Judge Gartner is incorrect?

Mr. UNGER. No, sir—well, if I came over—I did not bring it over. Judge Gartner is not incorrect. An order was brought over when he asked me if I had one.

Senator SPECTER. But Judge Gartner is incorrect when he says, "He brought over a strong application, plus a purported order"?

Mr. UNGER. Michael Kohn brought it over.

Senator SPECTER. Do you have a copy of the order?

Mr. UNGER. No. There was only one draft of it, and I think it was—the proposed order, the one that Mike had, no.

Senator SPECTER. Now, without taking the time to read this memorandum of law, which I am now looking at for the first time, does this involve a substantive question on which there was a controversy between you and the other side?

Mr. UNGER. I think it does. I really——

Senator SPECTER. Then, I don't need to read it. I can read it later.

Mr. UNGER. I really—as I said in your absence, I think that the conference wavered close to places where I was uncomfortable, and with the advantage of detached hindsight, maybe I should have said "Stop," but it is awfully hard to do when a judge calls you in, and I have to say that, because that is my feeling. I think——

Senator SPECTER. But all I want to focus on now is the fact that it was a substantive matter

Mr. UNGER. Yes. He might not have filed it; he might have just sent the application down for hearing. I did not know what he was going to do with it.

Senator SPECTER. All right. But you agree at this point that the legal matter contained within the application or the memorandum was a substantive matter, not an administrative matter, a substantive matter on which there would have been a controversy, that would have been asserted by opposing counsel, had opposing counsel been present.

Mr. UNGER. I think that is correct. I think the conference wavered back and forth and went too far.

Senator SPECTER. All right. Let me turn now to the issue raised by Justice Moore, and see if I can follow what happened here, bearing in mind the issue it was just brought to our attention yesterday, and I have not had a chance to examine these documents.

The essence of my concern here, Mr. Unger, relates to the allegation that you filed a false affidavit, that its falsity was brought to your attention, and that you then pursued the issue of the disqualification of the opposing counsel. The narrow question which I would like to get to as promptly as possible—and we can go back over the details—is why, once you knew that your affidavit was false, did you pursue the motion to disqualify the opposing counsel?

Mr. UNGER. Because my client took the position that I had no right to waive it, and insisted that we pursue that. I——

Senator SPECTER. Well, you have an obligation as an attorney, do you not, not to proceed on arguments which are based upon false allegations of fact?

Mr. UNGER. My client's—the answer to that is yes, sir—my client's affidavit says that he or any of his officers, it or any of its officers, were not advised by me or anybody else that this man had moved from one firm to the other and opposed us. And that probably is my error, but the information came outside of the——

Senator **Specter**. Well, when you are notified as his attorney, that binds your client as your principal.

Mr. **Unger**. I was left with the choice, Senator, of resigning myself from that case or going forward with the motion.

Senator **Specter**. Well, a client may assert that he is not bound by the notice given to you as his attorney and agent. He may assert that. But it seems to me very difficult, if not impossible—that delightful buzzing is another vote, Mr. Unger—for you to assert in a litigation matter, a position which is contrary to the facts that you know to be true, even if your client did not know them to be true.

Mr. **Unger**. I tried to have Mr. Kohn show the court that I did know those facts to be true, which essentially is saying that the motion is not very strong.

Senator **Specter**. Well, do you agree that had you known the real facts, that you would not have had any substantive basis to file a motion for disqualification?

Mr. **Unger**. If I had known the real facts——

Senator **Specter**. Well, if you had known that this young lawyer had been associated with the other lawyer—I am trying to avoid getting into all of the facts. I am trying to get to the conclusory issues.

There is a charge here that you filed a false affidavit, based upon information called to your attention by Justice Moore; right?

Mr. **Unger**. That is correct, and I tried to correct that.

Senator **Specter**. All right. Now, at this point, you agree that Justice Moore's allegations of fact from Justice Moore were the correct facts.

Mr. **Unger**. Yes, sir.

Senator **Specter**. Now, had you known that the version that Justice Moore set forth to be true, would you have filed the affidavit?

Mr. **Unger**. No.

Senator **Specter**. Of course not. And, had you not filed the affidavit, would you have had a factual basis to assert the motion to disqualify?

Mr. **Unger**. Based on the other affidavits?

Senator **Specter**. Well, were there other facts that would have justified disqualifying opposing counsel——

Mr. **Unger**. My client——

Senator **Specter** [continuing]. Wait a minute, let me finish here—would there be other facts to justify the disqualification of the other lawyer if all of the facts set forth by Justice Moore were accepted as true?

Mr. **Unger**. Only my obligation to my client, who says he was not informed, and he had that right.

Senator **Specter**. So, it ends up with your client asserting that the lawyer should be disqualified because he had not been informed about the young lawyer's employment?

Mr. **Unger**. And my saying in effect that I did know it; I did not communicate it with my client.

Senator SPECTER. Well, that, at most, it seems to me, Mr. Unger, is a problem between you and your client. It does not go to the disqualification of the other lawyer.

Mr. UNGER. It certainly was a problem between me and my client.

Senator SPECTER. Well, does it go to the disqualification of the other lawyer? To get to the bottom line, and I am laying it all on top of the table, just getting to the point and seeing where you stand on it, I do not see any justification for you to have pursued the application for disqualification.

[Pause.]

Senator SPECTER. And I will say that—after the record shows a pause—I do not see any basis for that, because you are too good a lawyer to think—or, I believe you are too good a lawyer—to contend that the other counsel should be disqualified because you did not tell your client something which is really extraneous to the central issue and the motion for disqualification.

Mr. UNGER. I agree that what I was really saying to the court when I said Justice Moore is right is that the motion is without merit. And I guess I was at the same time pacifying my client.

Senator SPECTER. Well, the problem is that it bears upon your concession that you had filed a false affidavit. What is the strongest——

Mr. UNGER. I would prefer to say "an erroneous" affidavit.

Senator SPECTER. All right, make it an erroneous affidavit. I will accept that. I think you are entitled to all of the beneficial inferences here. We are talking about a punitive measure, and we are talking about technical matters, and I am prepared to give you the benefit of the inferences. But what is the strongest statement that you can make to this committee at this time that you acknowledged there was an erroneous affidavit?

Mr. UNGER. What is the strongest statement that I acknowledged it?

Senator SPECTER. The strongest statement you can make.

Mr. UNGER. I was out of the country. I had Mr. Kohn call Mr. Moore. And we were at page 11 on the affidavit earlier, where Mr. Moore states that Mr. Kohn phoned him, "and indicated that he had been able to reach Mr. Unger, who confirmed he recalled my letter of February 23, 1978, including the specific reference to Mr. Elzufon's association with Mr. Tybout. Mr. Kohn related that Mr. Unger asked him to relate that back to the court and thus correct any erroneous statement concerning Mr. Unger's knowledge of Mr. Elzufon's association with Mr. Tybout, at the next proceeding before this court, scheduled for Monday, February 4, 1980."

Senator SPECTER. And then the next statement is, "However, Mr. Kohn advised me that Mr. Unger instructed him to proceed with the motion to disqualify Mr. Tybout."

Mr. UNGER. That is correct. But I did the best that I could to correct the affidavit as soon as I found out it was wrong. I did not return back to the country before the argument.

Senator SPECTER. Mr. Unger, did you ever do anything with the court yourself to correct the erroneous affidavit?

Mr. UNGER. The matter was ruled on before—Mr. Kohn made a statement in open court, but the matter was ruled on, and the motion lost, before.

Senator SPECTER. Do you have a copy of the transcript where Mr. Kohn said that in open court?

Mr. UNGER. No, sir.

Senator SPECTER. Do you think you could find that?

Mr. UNGER. I would have to ask Mr. Kohn. As I said, I never appeared back in Wilmington after that motion was made. I was a little uncomfortable with the motion, as well.

Mr. Kohn can respond, if he cares to. We did not get these papers until the Senator did, I might add as well.

Senator SPECTER. It is now almost 4 o'clock, and as I speak the bells are going off for the 7½ minute warning on the vote. We are in a series of votes at the moment, on the milk bill, and I do not know how long it would be before I could return. Accordingly I think it preferable at this stage to conclude the hearing.

There may be some more questions that I will have, Mr. Unger. It is likely that you will be commenting further in response to what Mr. Coleman has to say, unless the chairman surprises me and does not give you that opportunity, I think he will however, and I think he should, and I cannot imagine a situation where you would not want to reply. So rather than keep you sitting here for a protracted period of time, and all the people who are present, I am going to terminate this hearing at this time. Having said that I will want to come back and follow up on a number of other matters.

Mr. UNGER. I will try to make myself available at any time.

Senator SPECTER. Mr. Short promises me that that will be at sometime after the recess, as Mr. Short does not think it appropriate to meet this Saturday.

Mr. KOHN. Senator, did you want a response from me on the transcript?

Senator SPECTER. No. We are going to have to do that later, because I will miss the vote if I do not leave now.

Mr. KOHN. Thank you.

[Whereupon, at 3:58 p.m., the proceedings were adjourned, subject to the call of the chair.]

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